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REPORTS
OF
CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI

Between March 7, 1921, and April 30, 1921.

PERRY S. RADER,
REPORTER

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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. ROBERT FRANKLIN WALKER, Chief Justice.

HON. JAMES T. BLAIR, Judge.

HON. ARCHELAUS M. WOODSON, Judge.

HON. WALLER W. GRAVES, Judge.

HON. EDWARD HIGBEE, Judge.

HON. DAVID E. BLAIR, Judge.

HON. CONWAY ELDER, Judge.

JESSE W. BARRETT, Attorney-General.

J. D. ALLEN, Clerk.

H. C. SCHULT, Marshal.

JUDGES OF THE SUPREME COURT

BY DIVISIONS.

DIVISION ONE.

HON. ARCHELAUS M. WOODSON, Presiding Judge.

HON. JAMES T. BLAIR, Judge.

HON. WALLER W. GRAVES, Judge.

HON. CONWAY ELDER, Judge.

HON. STEPHEN S. BROWN, Commissioner.

HON. WILLIAM T. RAGLAND, Commissioner.

HON. CHARLES EDWIN SMALL, Commissioner.

DIVISION TWO.

HON. EDWARD HIGBEE, Presiding Judge.

HON. ROBERT FRANKLIN WALKER, Judge.

HON. DAVID E. BLAIR, Judge.

HON. NORMAN A. MOZLEY, Commissioner.

HON. ROBERT T. RAILEY, Commissioner.

HON. JOHN TURNER WHITE, Commissioner.

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CASES ARGUED AND DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI
AT THE
OCTOBER TERM, 1920

(Continued from Volume 286.)

THE STATE v. POLLY HOWE, Appellant.

Division Two, March 7, 1921.

1. **CONSTITUTIONAL QUESTION: Preserved for Review.** If the constitutional question was raised only by a motion to quash the information, and the bill of exceptions fails to show that a motion to quash was filed or overruled, the question is not for consideration on appeal.
2. **PROSTITUTION: Receiving Money of Prostitutes: Act of 1913.** Section 3 of the Act of 1913, Laws 1913, page 220 (the Missouri "White Slave" Act) does not distinguish between the character of persons to whom it is intended to apply, but is broad enough to embrace all persons who knowingly accept money earned by a woman by acts of prostitution, without consideration, regardless of the manner in which it is received, whether they be procurers, or men engaged in illicit traffic with women, or a woman who keeps a bawdy house and requires another woman therein to divide with her the proceeds of her earnings while engaged in prostitution.
3. ———: ———: **Earned by Illicit Sexual Intercourse.** An instruction telling the jury that if defendant did knowingly, unlawfully and feloniously accept, receive or appropriate to her own use any

amount of unlawful money made by the earnings of a certain woman, "by engaging in prostitution, that is, by having illicit sexual intercourse with men," etc., includes words not in the statute, and by the use of the word "illicit" might require the jury to find that the prostitution of the woman was criminal; but their inclusion is an error of which the defendant cannot complain, because these words placed upon the State a greater burden than the statute does, and requires the jury to find a fact which the statute does not make an element of the offense. The statute only requires the jury to find that the money received by defendant was earnings received by a woman engaged in prostitution; and if the money was so earned, and defendant knowingly received it, without other consideration, she is guilty under the statute, although the conduct of the prostitute may not have been violative of the criminal law.

4. ———: ———: **Evidence: Physician's Receipt.** A physician's receipt showing that defendant had paid a bill for the prosecutrix, offered for the purpose of accounting for the absorption by the defendant of the prosecutrix's money, is a mere statement of a third person not a party to the suit, without opportunity of cross-examination, and is therefore pure hearsay, and is properly excluded.
5. **DEFENDANT AS WITNESS: Cross-Examination: Former Conviction.** Under the statute (Sec. 6383, R. S. 1909), a defendant, who takes the witness stand in his own behalf, may be asked on cross-examination if he was ever convicted of felony or other crime.
6. **EVIDENCE: Running off Witness.** Testimony tending to show that defendant has attempted to procure false evidence, or to destroy evidence against himself, or to spirit away the prosecutrix so as to prevent her from testifying, is always admissible.
7. **OPENING STATEMENT.** It is not incompetent for the prosecuting attorney to mention any fact in his opening statement which he can prove and it is competent for him to prove. It was not improper for the prosecuting attorney in his opening statement to state that defendant had attempted to spirit away the prosecutrix, since it was proper to prove that fact and there was evidence tending to prove it.

Appeal from Randolph Circuit Court.—*Hon. A. W. Walker*, Judge.

AFFIRMED.

Irwin & Haley and R. A. Higdon for appellant.

(1) The legislative act, Laws 1913, p. 219, under which defendant was tried, is unconstitutional in that the bill, as enacted, does not conform to the requirement of Section 28 of Article IV of the Constitution, in that said bill contains more than one subject, as is expressed in its title. The title even embodies the subject of removal of disqualifications of witnesses. While it is true that this title, as given in the caption, is not treated in the body of the bill, still this should enter into consideration of the point here made. A bill to comply with the Constitution should deal with subject-matters having natural connection. The provisions of this act must be germane to the subject. *State v. Coffee & Tea Co.*, 171 Mo. 634; *State v. Bixman*, 162 Mo. 1. (2) Even conceding the constitutionality of the law, it has no application to the facts as established by the evidence in this case. The evidence tends to prove only that the defendant was guilty of a misdemeanor, to-wit, a bawdy-house keeper. (3) The instructions given by the court might be said to approximately cover the case under the theory taken by the trial court, that a bawdy-house keeper who, by furnishing house, room, board, etc., and who received in consideration there for a share of the money earned by inmates, comes within the purview of the act under which defendant was tried. Appellant contends that such was not the intendment of the act, and that all the instructions given are error. (4) The trial court voiced his interpretation of the act, and in Instruction 1, complained of, gave an unwarranted extension to the act itself, by refusing to use the words of the statute, "without consideration," and by substituting instead the words "without any consideration therefor independent of said witness engaging in illicit sexual intercourse as aforesaid." (5) The court should have instructed the jury as to the meaning of the words "illicit sexual intercourse" used in Instruction 1, by defining the same, as the duty devolves upon the State to define the meaning

of technical words when used in informations and instructions. (6) The State was permitted to offer testimony tending to prove the crimes of false imprisonment, tampering with a witness, the removal and secretion of witnesses, and other crimes, with none of which defendant stood charged. The admission of this testimony is clearly in violation of the general rule and cannot be justified under any exception to the rule that the courts of this State have ever recognized. *State v. Duff*, 253 Mo. 415; *State v. Hyde*, 234 Mo. 200; *State v. Hale*, 156 Mo. 102; *State v. Moberly*, 121 Mo. 604; *State v. Young*, 119 Mo. 495; *State v. Reed*, 85 Mo. 194; *State v. Martin*, 74 Mo. 547; *State v. Goetz*, 34 Mo. 85. (7) The court permitted the defendant to be cross-examined concerning many matters about which she did not testify in chief, all over the objections of defendant. This cross-examination even embraced examination as to other alleged crimes than that charged in the information. The cross-examination of defendant concerning conversations with Niece Bond and transactions alleged as occurring in Kansas City, Missouri; concerning abduction of witnesses, and concerning alleged threats to kill prosecuting witness if she did not sign statements, none of which had been gone into in defendant's examination in chief, are all violative of well-defined rules of evidence and were highly prejudicial to defendant. Added to this error, three witnesses were permitted to testify to impeach defendant on answers compelled on cross-examination concerning matters not gone into in her examination in chief, all to the prejudice of defendant. *State v. Grant*, 144 Mo. 56; *State v. Hathborn*, 116 Mo. 229; *State v. Brannum*, 95 Mo. 19; *State v. Fullerton*, 90 Mo. 411; Sec. 5242, R. S. 1909. (8) The defendant produced a receipted bill for money paid by defendant for medical services rendered to the prosecuting witness. The court not only rejects this evidence, but reprimands defendant's counsel for offering same. We submit, the charge being specifically for money had and received without lawful consideration, that the defendant in all

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conscience should have been permitted to introduce a receipted bill for money paid in behalf of prosecuting witness.

Frank W. McAllister, Attorney-General, *Henry B. Hunt*, Assistant Attorney-General, and *A. L. Shortridge*, of counsel, for respondent.

(1) The filing and overruling of a motion to quash must appear in the record proper. As the purported constitutional question is set forth in a motion to quash, the filing and overruling of which motion is not noted in the record proper, no constitutional question is raised for review. 4 C. J. 59, sec. 1647; 2 Cyc. 1041; *State v. Scobee*, 255 Mo. 272; *State v. George*, 221 Mo. 521; *State v. Tooker*, 188 Mo. 444; *State v. Glasscock*, 232 Mo. 291; *State v. Wooley*, 215 Mo. 675; *State v. Finley*, 234 Mo. 604. (2) The Act of 1913 deals with but one subject, pandering, which is clearly and solely expressed in the title of said act. Laws 1913, p. 219; 1 Sutherland, Statutory Construction, p. 249; *Ewing v. Hoblitzelle*, 85 Mo. 71; *State v. Doerring*, 194 Mo. 408; *People v. Fegelli*, 163 App. Div. (N. Y.) 579. A bill is not defective because it does not deal with all matters expressed in the title. 36 Cyc. 1032; *State ex rel. v. Bronson*, 115 Mo. 276; *State v. Burgdoerfer*, 107 Mo. 28. (3) The act in question created the substantive offense of pandering. Section 3 of said act designates one of the prohibited forms of said offense, and the evidence tended to prove the offense as charged under said section. Laws 1913, p. 219; *State v. Fink*, 186 Mo. 56; *People v. Fegelli*, 163 App. Div. (N. Y.) 577; *Currington v. State*, 72 Tex. Cr. 148. (a) Said Act of 1913, Section 3, was not aimed solely at the "cadet" who subsists directly on a prostitute's earnings. The purpose of the act was to stop all forms of money making from earnings by prostitution. *People v. Fegelli*, 163 App. Div. (N. Y.) 578; *Currington v. State*, 72 Tex. Cr. 148. (b) Said act did not repeal, and does not conflict, with the statute prohibiting the setting

up and keeping of a bawdy house. Sec. 4754, R. S. 1909; 36 Cyc. 1095; 1 Sutherland, Statutory Construction, p. 463; State v. Brotzer, 245 Mo. 508. (4) The State introduced evidence tending to show that appellant, after her arrest, falsely imprisoned the prosecutrix, abducted and secreted her, forced her to make a false affidavit denying the offense, and persuaded her to agree to testify in appellant's behalf. This evidence was competent to show appellant's consciousness of guilt. 16 C. J. 555, sec. 1075; 12 Cyc. 398; Underhill, Crim. Ev. (2 Ed.) sec. 121; Kelly's Crim Law, sec. 289; State v. Alexander, 184 Mo. 274; State v. Alexander, 119 Mo. 461; State v. Matthews, 202 Mo. 148; Ryal v. State, 182 Pac. (Okla.) 257; State v. Keith, 47 Minn. 563; Conway v. State, 118 Ind. 490. (5) The Court properly permitted the State to cross-examine appellant with reference to her meeting with Niece Bond. State v. Sherman, 264 Mo. 381; State v. Ivy, 192 S. W. 736; Sec. 5242, R. S. 1909; 40 Cyc. 2714; State v. Avery, 113 Mo. 499; State v. West, 95 Mo. 143; State v. Baker, 262 Mo. 699.

MOZLEY, C.—On the 18th day of June, 1919, the defendant was convicted in the Circuit Court of Randolph County, and sentenced to a term of four years in the penitentiary, on the charge of receiving, without consideration, the sum of thirty dollars from Lillie Slingman, the money earned in prostitution, contrary to Section 3 of the Act of 1913, Laws 1913, p. 220. The information was filed in Pettis County, charging the commission of the offense in that county, and a change of venue was granted to Randolph County, where the case was tried. The defendant appealed.

The evidence shows that the defendant kept a house of prostitution in the City of Sedalia. Lillie Slingman became an inmate of that house some time in February, 1919, and remained there a week or more and then ran away, she testified. Her testimony, and that of two or three other inmates of the same house, was to the effect that she had an arrangement with the defendant whereby she was to pay three dollars for her board and give

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to the defendant half the money which she made while there. She earned sixty-three dollars while at the place, the proceeds of prostitution. The defendant took all the money as soon as Lillie collected it, and after deducting her half charged Lillie the balance for clothes, etc. The evidence is entirely clear and sufficient to show the character of the house kept by defendant, and the agreement between Lillie Slingman and defendant and the manner in which the money was earned.

The information was filed April 5, 1919, and the trial began on the 17th day of June and ended by a verdict on the 18th of June. Evidence was introduced by the State to show attempts by the defendant, between the time of the arrest and the trial, to get Lillie Slingman out of the way. She was persuaded to get into an automobile one day, was taken to Clinton and sent to Springfield; was for a time in Kansas City, and in Quincy, Illinois. She was brought back to Sedalia by the sheriff at one time from Joplin, Missouri, and another time from Quincy, Illinois. She had been in jail in order to hold her as a witness, just prior to the time she testified.

At one time, while apparently under the influence of the defendant, in June, 1919, she made an affidavit in which she stated that all that she had previously said about receiving money from men and dividing with Polly Howe, and the kind of house Polly Howe kept, was untrue; that Polly Howe was kind to her, and that her business was dressmaking, and that the prosecuting attorney had threatened her with jail and the penitentiary if she did not state that Polly Howe had spirited her off. On being shown this affidavit while on the stand, the witness stated that she was taken to defendant's residence; that a lawyer was there who asked her to sign the affidavit; that the affidavit was not read to her but she signed it because she was afraid of the appellant, who had a gun on the table at the time.

Defendant testified that she received no money from Lillie except for her clothes and doctor's bills, and in-

troduced evidence tending to show that she was entirely innocent of the crime charged. Other facts in connection with the alleged offense will be mentioned in considering the points urged for reversal.

I. The demurrer to the evidence was properly overruled. The case was one for the jury.

II. It is claimed by appellant that the statute under which the appellant was prosecuted is unconstitutional. The constitutional question, it is asserted, was raised by motion to quash the information. The transcript of the record proper filed in this court nowhere shows the filing or overruling of any motion to quash. On the suggestion of a diminution of the record, a writ of *certiorari* was directed to the Clerk of the Circuit Court of Randolph County requiring him to certify the record in said cause. In response to the writ the clerk of the circuit court sent here his certificate showing that a bill of exceptions was filed, but presented no copy of any record showing that the motion to quash was ever filed or overruled. Therefore, the unconstitutional question is not before us for consideration. [State v. Wade, 263 Mo. 263; State v. Scobee, 255 Mo. l. c. 272; State v. George, 221 Mo. l. c. 521.]

III. It is further urged by the appellant that Section 3 of the Act of 1913 defining a felony cannot apply to the defendant in this case. It is contended that Section 4754, Revised Statutes 1909, which provides a penalty for keeping a brothel or bawdy house, describes the offense of which the defendant was guilty as a misdemeanor, and that the receiving of money earned by the inmates of the place was not the offense intended by the Legislature to apply to such person. The argument is that the act was intended to apply to procurers and cadets, and particularly to men engaged in the traffic with women. The Act of 1913 is the Missouri "white slave" act, and the language of Section 3 does not distinguish between the character of persons to whom it is intended to apply. It

is broad enough to embrace any person who knowingly accepts money earned by a woman in prostitution, without other consideration, regardless of the manner in which it is received. The fact that the defendant may have been guilty of another offense against which the statute is leveled would not prevent her being guilty of the offense under consideration.

IV. It is further contended that the court erred in giving instruction number one, as follows:

"1. The court instructs the jury that if you believe and find from the evidence that the defendant at the County of Pettis, in the State of Missouri, on the—day of February, 1919, or at any time within three years next before the filing of the information herein, to-wit, the 7th day of April, 1919, did knowingly, unlawfully and feloniously accept, receive or appropriate to her own use any amount of lawful money of the United States from earnings made by the witness, Lillie Slingman, by engaging in prostitution, that is by having illicit sexual intercourse with men, and that said money was accepted, received or appropriated to her own use by defendant without any consideration therefor independent of said witness engaging in illicit sexual intercourse as aforesaid, then you should find the defendant guilty, and assess her punishment at imprisonment in the penitentiary for a term of not less than two nor more than twenty years."

Section 3 of the Act under consideration is as follows:

"Sec. 3. *Earnings of prostitute—not to be accepted or received—felony—penalty.* That any person who shall knowingly accept, receive, levy or appropriate any money or other valuable thing, without consideration, from the proceeds of the earnings of any woman engaged in prostitution, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment for a period not less than two nor more than twenty years."

The objection to the instruction is that the jury was required to find that the money was received "by having

illicit sexual intercourse with men." This clause is not in the statute nor is it in the information—the information following the language of the statute. It is argued that the immoral conduct of women kept in a house of the character described might be such that no statute makes it criminal, while this instruction directs the jury to find that the money was earned by "illicit" or criminal acts, that is, acts against which some statute is leveled.

That is error in the instruction, but the appellant is not injured by it; it is an error against the State. It requires a finding by the jury of a fact which the statute does not require to be found as an element of the offense. The instruction put an additional burden upon the State, which the law did not impose; that is not an error of which the defendant has any right to complain. [Turnbow v. Kansas City Rys. Co., 277 Mo. 644; Krinard v. Westerman, 279 Mo. 680; Bryant v. K. C. Rys. Co., 217 S. W. 1. c. 634; Malone v. St. L. & S. F. Ry. Co., 213 S. W. 1. c. 867; Shawhan v. Shawhan Dist. Co., 197 S. W. 1. c. 374; Martin v. Coal Co., 174 Mo. App. 1. c. 445-6; Moore v. McHaney, 191 Mo. App. 1. c. 697.] The statute required a finding only that the money received by the defendant was earnings of the Slingman woman in prostitution. Although the conduct of Lillie Slingman while an inmate of the defendant's house may have been strictly within the law so far as the criminal statute is concerned, yet if the money was earned by the means described in the statute, and the defendant knowingly received it without other consideration, defendant was guilty.

V. While the defendant was on the stand counsel offered in evidence a receipt by a physician showing the defendant had paid a doctor bill for Lillie Slingman amounting to \$25. This receipt was offered to account for the absorption by the defendant of Lillie's money. The evidence was excluded, and error assigned to the ruling. The evidence was pure hearsay; such a statement by a third person not a party to the suit, with no opportunity to cross-examine, comes within the rule relating to hearsay evidence. [Doherty

**Receipt as
Evidence.**

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v. Doherty, 155 Mo. App. l. c. 487; Howell v. Sherwood, 242 Mo. 513.]

VI. Defendant was asked on cross-examination if she had ever been arrested and convicted of crime. She stated that she had, three times, and then mentioned the three offenses of which she had been convicted. It is urged that this cross-examination is error because the defendant was not examined as to those matters in chief.

Defendant:
Cross-Examination.

Section 6383, Revised Statutes 1909, is as follows: "Any person who has been convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination," etc.

This section repeatedly has been held by this court to apply to a defendant who takes the stand in his own behalf. [State v. Larkin and Harris, 250 Mo. l. c. 240-241; State v. Spivey, 191 Mo. l. c. 110-111; State v. Woodward, 191 Mo. 617, l. c. 633; State v. Thornhill, 174 Mo. 364; State v. Banks, 258 Mo. 479; State v. Corrigan, 262 Mo. 195; State v. Mills, 272 Mo. 526; State v. Barrington, 198 Mo. 23; State v. Barnett, 203 Mo. l. c. 657; State v. Johnson, 192 S. W. 441.]

In the case of State v. Larkin and Harris, *supra*, this court pointed out the apparent conflict between Section 6383 and Section 5242 which prohibits the cross-examination of a defendant, while a witness, upon matters not referred to in his examination in chief; but holds the rule to be well settled in this State that a defendant, in any case, while on the stand, may be asked on cross-examination if he was ever convicted of a felony or any other crime. Section 5242 provides that a defendant in such case "may be impeached as any other witness."

VII. Error is assigned to the action of the trial court in permitting the State to show over the objection **Spirit** tempted to spirit Lillie Slingman away so **Witness.** as to prevent her testifying. Evidence is always admissible for the purpose of showing that the

accused has attempted to procure false evidence or destroy evidence against himself. [State v. Mathews, 202 Mo. l. c. 149; State v. Alexander, 119 Mo. l. c. 461; State v. Alexander, 184 Mo. l. c. 274.] The ruling was correct.

VIII. It is claimed that the prosecuting attorney in his opening argument was allowed by the court to make statements which were prejudicial and improper. The only matter complained of in the prosecutor's opening statement was a reference to the attempt of the defendant to spirit the witness Lillie Slingman away. The objection of defendant's counsel was sustained, and the prosecutor made no further reference to the matter. Besides, it was competent to show such facts in evidence, and it was not improper for the prosecutor to mention it in his opening statement.

IX. It is further complained that the prosecuting attorney, and other attorneys hired to assist him, were unruly and made many prejudicial statements in the progress of the trial. The case appears to have been fought with a good deal of pertinacity on both sides. A careful examination of the record shows that the attorneys for the defendant were quite as vigorous in their protestations as the counsel for the State. We are not pointed to any particular instance where the counsel for the State transcended the rules of propriety in the conduct of the case and was sustained by the court; nor, by careful examination of the record, do we find any instance of that kind.

There being no error in the conduct of the case, the judgment should be affirmed.

It is so ordered. *White, C.*, concurs; *Railey, C.*, not sitting.

PER CURIAM:—The foregoing opinion of *MOZLEY, C.*, is hereby adopted as the opinion of the court. All concur.

THOMAS BROOK v. SYLVESTER BARKER and
ANNIE E. BARKER, Appellants.

Division Two, March 7, 1921.

1. **APPELLATE PRACTICE: Verdict for Right Party: Decision on Point Not Raised by Instructions.** Plaintiff sued for curtesy consummate in his wife's lands conveyed by her alone in her lifetime. The answer was a general denial, and verdict was for defendants. The court granted a new trial on the ground that the verdict was "unsupported by any evidence," and the defendants appeal. Both plaintiff and defendants tried the case on the theory that if plaintiff and the sole grantor in the deed were husband and wife, that issue was born alive of the marriage, that she was seized of the premises during coverture and died before suit was brought, and that defendants were then in possession, plaintiff was entitled to recover. Plaintiff's instructions were framed on this theory, and defendants filed no demurrer and the only instructions asked by them were given, and these related only to the burden resting upon plaintiff to prove the birth of living issue and the other issues of fact set out in plaintiff's petition. *Held*, that, notwithstanding court and counsel were mistaken as to the law of the case, in that their theory was that the husband, not having joined in his wife's deed, had a curtesy estate in the land, yet, the verdict being for the right party in view of the facts and the law, the order granting a new trial will be reversed, and the cause remanded with directions, to set it aside and to reinstate the judgment.
2. **CURTESY: Deed by Wife Alone.** The estate of the husband, both by the curtesy initiate and by the curtesy consummate, is completely wiped out by a conveyance by the wife of her separate real estate during her lifetime, regardless of his failure or refusal to join in her deed.
3. ———: ———: **Married Woman's Acts.** The Married Woman's Acts of 1889, declaring (in Sec. 7328, R. S. 1919) that all real estate belonging to any woman at her marriage, or which may have come to her during coverture by gift or inheritance, or by purchase with her separate money or means, shall be and remain "her separate property and under her separate control," and by declaring (in Sec. 7323, R. S. 1919) that "a married woman shall be deemed a *femme sole*" so far as to enable her "to contract and be contracted with," gave to a married woman the unrestricted

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right to convey her said real estate by her sole deed, without her husband joining therein, and such a conveyance by her alone extinguishes his curtesy in her real estate so conveyed.

Appeal from Scotland Circuit Court.—*Hon. N. M. Pettigill*, Judge.

REVERSED AND REMANDED (*with directions*).

J. E. Luther and *C. C. Fogle* for appellants.

(1) The assignment "that the verdict rendered by the jury is unsupported by any evidence" is too general and indefinite to constitute a ground for a new trial. (2) The verdict is supported by the evidence for the reason that the evidence introduced by both sides conclusively shows that the defendants have ever since the date of the execution of the deed from Sill to the defendants been the owners, and entitled to the possession, of the real property in question. (3) The burden of proof was on the plaintiff to show that at the times alleged in his petition he was the owner, and entitled to the possession, of the said real property. As he did not sustain the burden the verdict was supported by the evidence. (4) As the evidence introduced by both sides shows defendants were the owners, and entitled to the possession, of the said real property ever since the Sill's deed to them, the plaintiff could not show that he was the owner and entitled to the possession thereof. Therefore no verdict in favor of plaintiff could be allowed to stand. (5) The effect of the Married Women's Acts is to abolish the estate by the curtesy, both initiate and consummate, in all property of the wife acquired after their enactment. Hence plaintiff did not, and could not, show that he was the owner, and entitled to the possession of the said real property. (6) Since the enactment of the Married Woman's Acts the separate conveyance by the wife of property thereafter acquired by her destroys the husband's estate by the curtesy, both initiate and consummate, if any, therein. Hence plaintiff did not,

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and could not, show that he was the owner, and entitled to the possession, of the said real property. *Bank v. Hagelbaken*, 165 Mo. 443; *Kirkpatrick v. Pease*, 202 Mo. 471, 490; *Riggs v. Price*, 227 Mo. 333, 351; *Kirkpatrick v. Pease*, 202 Mo. 471.

Hudson V. Smoot for respondent.

(1) The assignment in the motion for a new trial "that the verdict rendered by the jury is unsupported by any evidence" is sufficient to warrant the court in examining the record to ascertain if there is any evidence which can sustain the verdict. *Securities Co. v. Kansas City*, 265 Mo. 264; *State v. Scott*, 214 Mo. 261. (2) The Married Woman's Act of 1889, Sec. 6869, R. S. 1909, now Sec. 8309, does not destroy the curtesy interest or estate of the husband, but merely gives to the wife the entire control and management of her real estate, and enjoyment of the usufruct free from her husband's control. She can convey it without her husband joining in the deed and pass a fee simple title, subject only to the contingency that her husband might outlive her and claim his curtesy therein. *Moseley v. Bogy*, 272 Mo. 328; *Teckenbrock v. McLaughlin*, 246 Mo. 717; *Myers v. Hansbrough*, 202 Mo. 500; *Brown v. Dressler*, 125 Mo. 589; *Donovan v. Boyd*, 215 Mo. 162; *Healey v. Tillberry*, 192 Mo. App. 513; *Rutledge v. Rutledge*, 177 Mo. App. 476.

DAVID E. BLAIR, J.—The action is ejectment for possession of the west half of Lots Seven and Eight in Block Four in the original town, now city, of Memphis, in Scotland County, and for damages and for fixing the value of monthly rents and profits.

The answer contained a general denial, and set up defendant's claim of title to the premises in controversy and alleged a certain agreement between respondent (plaintiff below) and his wife relating to the property, purporting to authorize the conveyance of said property by her free of any claim by the respondent. The reply denied the new matter of the answer and alleged that the

respondent was entitled to an estate by the curtesy in said property; that respondent was sixty-four years old when the petition was filed and entitled to the use of the property during his life or expectancy, and prayed the court to determine his interest in the property and require appellants to pay a gross sum in lieu thereof, as provided by Section 8499, Revised Statutes 1909.

Trial before a jury resulted in a verdict for appellants (defendants below). The trial court had struck out all testimony in a deposition of the appellants relating to the alleged agreement between respondent and his wife that she could convey her separate property. There was no other evidence on that issue. Upon motion a new trial was granted on the sole ground that the verdict is unsupported by any evidence. The appeal is from the order granting a new trial.

It is admitted that one John M. Nichols is the common source of title. On May 28, 1903, he conveyed the property in question to Alvira Brook, the wife of respondent, and she conveyed to Joseph P. Sill on October 28, 1909, while said Alvira was the wife of respondent. Sill conveyed to appellant Sylvester Barker on April 25, 1912. Appellant Annie E. Barker is the wife of Sylvester Barker. At the time the petition was filed and at the trial appellants were in possession of the property, claiming title. Respondent did not join in his wife's deed to Sill. A child was born alive of the marriage between respondent and his wife. Alvira Brook died May 16, 1917, and this suit was begun on September 15, 1917.

The funds for the purchase of the property in question were derived from the estate of Alvira Brook's deceased father. The evidence tends to show that at the time Alvira Brook purchased the property in May, 1903, she and respondent had ceased to live together as man and wife. The testimony in the deposition which was stricken out by the court tended to show an agreement that respondent and his wife should each own and control their individual property, and that respondent thereafter sold his farm and Alvira joined in the deed, and that when

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she conveyed the property in question to Sill in 1909 respondent, in violation of his alleged agreement, refused to join in the deed. This deed appears in full in the record and recites "that Alvira Brook and her husband Thomas Brook, . . . grant, bargain, sell, convey and confirm unto Joseph P. Sill, . . ." and it is signed and acknowledged only by Alvira Brook, without recital as to whether she was married or single.

After Alvira Brook conveyed the property to Sill valuable improvements were made thereon. There is some evidence in the record referring to the pendency of a divorce suit between respondent and his said wife. This undoubtedly was never pressed, because all parties are proceeding on the theory that the marriage relation existed at the death of Mrs. Brook in May, 1917.

I. Appellants contend that the assignment of error in the motion for a new trial, which the trial court stated to be the sole ground for sustaining the same, is not sufficient. Such assignment is as follows:

New Trial: "Because the verdict rendered by the jury
No Evidence. is unsupported by any evidence." Appellants cite *Falloon v. Fenton*, 182 Mo. App. 93, l. c. 98, in support of this contention. It was said in *State v. Scott*, 214 Mo. 261, "It is only in case there is no substantial evidence to support the verdict that this court will interfere." The assignment here is that there was no evidence at all to support the verdict. The assignment itself is sufficient, and if, in fact, there was no evidence to support the verdict, the motion for a new trial was properly sustained. The determination of this question presents the real question for decision.

II. If the deed of Alvira Brook to Joseph P. Sill in which respondent did not join, was effectual to convey the fee simple title to the premises in controversy free from any claim of respondent to a life estate therein by the curtesy, then the court erred in granting a new trial. More broadly stated, the question to be here determined is: Does Section 8309, Revised Statutes 1909 (Sec. 7328,

R. S. 1919), abolish the husband's estate by the curtesy consummate in his wife's separate real estate when she has conveyed same during her lifetime by a deed in which he has not joined?

It would appear upon an examination of the abstract of the record that both appellants and respondent tried the case below on the theory that if respondent was the husband of Alvira Brook and issue of the marriage was born alive and Alvira was seized of the premises during coverture and died before the suit was filed and appellants were then in possession of the premises, respondent was entitled to recover. Respondent's instructions were framed on that theory. Appellants filed no demurrer at the close of all the evidence, and the only instructions asked by appellants were given by the court. These related only to the burden cast upon respondent of proving the birth of living issue, and other issues of fact set out in respondent's instructions, and to the form of verdict if the jury found for appellants.

If the jury, out of sympathy for the unfortunate situation of appellants, disregarded the instructions of the court and found for appellants, yet must that verdict be permitted to stand nevertheless, if, perchance, court and counsel were mistaken as to the law of the case and the verdict after all was for the right party? [In re Lankford Estate, 272 Mo. 1.] Such is the question to be determined.

Under the common law respondent would clearly have been entitled to possession of the premises at the time the petition was filed and at the date of the trial. Marriage, birth of living issue, seizin in the wife during coverture, death of the wife—all the essentials of an estate by the curtesy consummate at common law—are here present. The husband's right could only be cut off by joinder in the deed. He must prevail here unless the provisions of Sections 8304 and 8309, Revised Statutes 1909, are such that the separate deed of his wife was sufficient to cut him off.

Section 8309, Revised Statutes 1909 (Sec. 7328, R. S. 1919), or the part thereof involved here, is as follows:

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"All real estate . . . belonging to any woman at her marriage, or which may have come to her during coverture by . . . purchase with her separate money or means . . . shall, together with all income, increase and profits thereof, be and *remain* her separate property and under her sole control."

Section 8304, Revised Statutes 1909, (Sec. 7323, R. S. 1919), is as follows:

"A married woman shall be deemed a *femme sole* so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party.

"

These sections of the statute are generally referred to as the Married Woman's Act and were enacted in 1889.

This is the first time the exact question here involved has been before this court for decision. A great deal of judicial learning has been expended in construing the statute from various angles. The case nearest like this one on the facts is *Farmers Exchange Bank v. Hageluken*, 165 Mo. 443. This was an action to foreclose a deed of trust executed by Mrs. Hageluken, in which her husband did not join. She made the defense that she was incompetent to convey the land mentioned in the deed of trust. She acquired title to the land in 1891. The trial court entered judgment foreclosing the deed of trust, and the judgment was affirmed by Court in Banc.

SHERWOOD, J., speaking for the court, after reviewing prior construction of the same statute in its effect on the separate personal property of the wife, at page 448, said:

"If, under Section 3296 as it originally stood, the personal property and rights in action became a married woman's separate property and under her sole control; and if as to such property she became a *femme sole* and

could execute alone a valid release for injuries done her, it is difficult to see why larger and more comprehensive rights did not accrue to, and become hers, by reason of the broad provisions of Section 6864, aforesaid. We hold that they did, and that under that section she had full power to contract with, and to deal with, strangers, or indeed with any one else to the full extent of the property rights mentioned in that section, and such contracts when made were followed by such results as attend the contracts of all others. To hold otherwise would be to ignore the plain and broad language of that section, as well as to ignore the evident progress made in our legislation toward the ultimate emancipation of married women from the shackles by which she was fettered at common law, and by the final consummation of that purpose by the enactment of existing statutes. . . .

“The statute was designed to confer on a married woman the *legal estate* in her land in as full and complete manner and degree, as if she were a *femme sole*. This is the view taken in Illinois of a statute which provided that such property ‘shall be and remain during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she were sole and unmarried,’ McALLISTER, J., remarking: ‘An estate so derived is no longer the mere creature of equity, dependent upon its power alone for protection, and its principles for the right of enjoyment; but, in all cases, when by the nature of the gift, bequest, devise, conveyance or deed of settlement, an absolute legal title would be vested in a *femme sole*, the same title would, under the statute, be vested in a *femme covert*, and the property be held, owned, possessed and enjoyed by her the same as though she were sole and unmarried. When the estate is thus transformed from an equitable to a legal estate, all of the rights incident to it must be legal rights. So far as the statute goes, her disability and her husband’s marital rights are alike swept away.’ [Cookson v. Toale, 59 Ill. 515.]

. . .

“Being the possessor of the legal title, a married woman’s deed must be as broad in its conveying power as that legal title and her capacity to ‘contract and be contracted with,’ and would consequently pass that legal title or it would pass nothing. To hold to the opposite of this would be to reject the plain meaning of the statutory words; to dwarf, cripple and pervert that meaning in utter disregard of the whole history of our progressive legislation on the subject under discussion.

“Instances have been cited in *Brown v. Dressler*, 125 Mo. loc. cit. 595, where an equitable lien has been created by an imperfect conveyance or contract to convey, following the familiar rule in equity. [Adams Eq. (8 Ed.) 121.] But no instance can be found in the books, either of court-writer or text-writer, where such equitable lien was held to be created, where a transaction took place between a man or woman and third parties, unless the grantor in the attempted conveyance was *sui juris*, and had the power without assistance, to make a valid conveyance. Such status of *sui juris*, and such power to convey, are denied in the case under comment, and yet the power to create an equitable lien is asserted.

“For these reasons we shall decline to follow the ruling in *Brown v. Dressler*, but on the contrary declare that Isabella received a full complete legal title by reason of the quitclaim deed made to her; and that she conveyed a title of like nature when she executed the deed of trust. And further that her husband was not a necessary party in this litigation.”

In *Riggs v. Price*, 277 Mo. 333, WALKER, J., speaking for Court in Banc and discussing the competency of a husband to testify in a suit brought against his wife involving her separate real estate, where the husband’s status as a competent witness depended on his interest in his wife’s separate real estate, at page 351, said:

“This reasoning would have been more cogent if he had been made a party to the suit and his right to testify had been based on an interest acquired in his wife’s property prior to the enactment of the Married Woman’s

Act in 1889, when the husband was, upon the birth of living issue, seized of an estate for life in his own right as a tenant by the curtesy initiate. Since the enactment of this statute, however, the wife as to the control and conveyance of her separate property is *sui juris*, and as such clothed with the right to sell her land and make a deed thereto independent of her husband. The consequent effect of this grant of power is to destroy the tenancy by the curtesy initiate, because it can no longer exist as an estate or interest in the husband in the presence of the wife's complete power of disposal of her property, but is reduced to a mere interest in expectancy.

"This conclusion finds its sufficient support in the language and purpose of the Married Woman's Act itself, which provides as to the matter here at issue, that she shall be deemed a *femme sole*, so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her; and that, in law or equity, she may sue or be sued without her husband being joined as a party. [Sec. 8304, R. S. 1909.]

"In construing this statute, we have explicitly held in *Farmers' Bk. v. Hageluken*, 165 Mo. 446, that it empowers a married woman to convey her real estate without joining her husband in the deed."

The *Riggs* case is the latest expression of Court in Banc in approval of the ruling made in the case of *Bank v. Hageluken*, *supra*. Four of the judges concurred. *WOODSON, J.*, did not sit; *FARIS* and *WILLIAMS, JJ.*, concurred in the result and in all except the paragraph from which the quotation is taken.

Kirkpatrick v. Pease, 202 Mo. 471, was a suit for specific performance of a contract to sell the separate real estate of the wife. The contract of sale was made by the wife's agent and the sale was subsequently ratified by her in writing. The husband was made a party defendant in the specific performance suit. The substance

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of the petition is set out in the opinion, and it appears therefrom that Mrs. Pease's husband in all things concerning the sale of the land and in the ratification thereof co-operated with her. The court found the husband did co-operate. The language used by Judge LAMM at page 490 is as follows:

"A married woman, as our statutes now run, is clothed with the right to sell lands held by her in her own separate right as her own separate property. [Farmers Exchange Bank v. Hageluken, 165 Mo. 443; R. S. 1899, secs. 4335, 4340.] She may make a deed there-to as a *femme sole*; hence, she may give authority to an agent to contract a sale, and it follows that she may ratify the act of her agent."

While the above language possibly was not necessary to the decision in the Kirkpatrick case, it is very illuminating upon the view which that learned judge had of the effect of the decision of the Hageluken case.

Evans v. Morris, 234 Mo. 177, was a suit in equity to establish a resulting trust in certain lands. The trial court refused to admit in evidence a deed signed by two married women conveying their separate property wherein their husbands did not join. BROWN, J., speaking for the court, at page 186, said:

"This deed was objected to and excluded on the ground that the said Eliza E. Shifflett and Dora E. Evans were then married women, and incapable of making a deed without their husbands joining them. The trial court committed error in excluding this deed, because these ladies, if they had attained the age of eighteen, were competent to transfer by their deed whatever interest they owned in the land, without their husbands joining them."

In First National Bank v. Kirby, 175 S. W. 1. c. 930, BROWN, C., referring to Sections 8304 and 8309, Revised Statutes 1909, said:

"It is evident that these statutes, purporting to secure a married woman's property to her own use, with the right to contract with reference to it as if she were

unmarried, and to permit it to be taken in execution for her debts, could be of little use to her should she continue to be tied hand-and-foot with disabilities in handling it. The ability to make contracts necessarily implies the grant of the ability to perform them, by removing the restrictions that had disabled her from handling the property with which she must respond to their obligations; and this court has so construed these statutes."

The learned commissioner then refers approvingly to *Bank v. Hageluken*, *supra*. See also *Bank v. Kirby*, 269 Mo. 285, 190 S. W. 597, on second appeal.

The language used in some of the Missouri cases may be said to throw some doubt on the correctness of the ruling in the *Hageluken* case, although that case has never been overruled or even criticised. In *Moseley v. Bogy*, 272 Mo. l. c. 328, *WHITE, C.*, said:

"The Married Woman's Act of 1889 applied to this property because the marriage took place in 1890. The husband's common-law curtesy was a mere life estate, contingent on his outliving her. The wife had entire control and management of her real estate, and enjoyment of the usufruct free from her husband's control. She could convey it without his joining in the deed and pass a fee simple title, subject only to the contingency that he might outlive her and claim his curtesy in it."

In the *Moseley* case the wife died seized of the property and the surviving husband was claiming curtesy in such property which the wife had undertaken to devise by will to her children.

In *State v. Keller*, 174 S. W. 67, which was a murder case wherein defendant had been refused an instruction telling the jury the defendant had the right to convey her separate property without the consent of her husband and without his joining in the deed, *FARIS, J.*, held that the refusal was not error on other grounds, and in passing expressed his doubt of the correctness of the rule attempted to be laid down in the refused instruction.

In *Teckenbrock v. McLaughlin*, 246 Mo. 711, *BLAIR, C.*, expressly refrained from stating any opinion as to

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the right of the wife to defeat her husband's curtesy in her separate real estate by her deed of conveyance independent of his joinder therein. In that case the wife had lost her suit to contest her mother's will, and a second suit had been brought by her, in which her husband joined. It was held that the Married Woman's Act had wiped out the husband's present interest in his wife's property, and that the husband could not maintain such will contest.

In *Brown v. Dressler*, 125 Mo. 589, BRACE, J., held that the Married Woman's Act did not give the wife the power to dispose of her separate real estate without her husband had joined in the deed, as required by Section 2396, Revised Statutes 1889, but recognized her power to bind her separate property by a lien for the purchase price. Section 2396, Revised Statutes 1889, was carried forward from the 1879 Revised Statutes.

In the *Hagelugen* case the court declined to follow the case of *Brown v. Dressler*, *supra*, thereby in effect holding that the provisions of Section 2396, Revised Statutes 1889, did not limit the power of the wife to convey her separate property, in view of the enactment of the Married Woman's Act.

Section 2396, Revised Statutes 1889, was carried forward as Section 901, Revised Statutes 1899. In 1905 the General Assembly repealed Section 901, Revised Statutes 1899, and enacted a new section in lieu thereof. The first sentences of the repealed Section 901 and the new Section 901 are identical, and read as follows:

"A husband and wife may convey the real estate of the wife and the wife may relinquish her dower in the real estate of her husband, by their joint deed acknowledged and certified as herein provided."

The enactment of 1905 was carried forward as Section 2788, Revised Statutes 1909, and Section 2175, Revised Statutes 1919. The decision in the *Hagelugen* case declining to follow and practically overruling the case of *Brown v. Dressler*, which was based on Section 2396, Revised Statutes 1889, was handed down December 3, 1901. It is fair to assume that the Legislature in 1905, in

re-enacting that portion of the statute, adopted the construction in effect put upon said section by the Supreme Court in 1901 in the Hageluken case, by declining to follow *Brown v. Dressler*, supra.

In *Myers v. Hansbrough*, 202 Mo. 495, the facts were that after the death of the wife seized of the property in question, the public administrator, under order of the probate court, took possession of the property of the wife to collect the rents therefrom to pay the debts of her estate. The deceased wife had not encumbered the property to secure the debts. Division One of this court, in an opinion by VALLIANT, P. J., held that the surviving husband had an estate in said property by the curtesy consummate, which could not be postponed or defeated by the creditors of the deceased wife. The facts are entirely different from those in the Hageluken case, and the two cases are thereby clearly distinguished.

WALKER, J., in *Riggs v. Price*, supra, distinguished that case from *Myers v. Hansbrough* on the ground that in the latter case the husband had an estate by the curtesy consummate, while in the *Riggs* case he had only an estate by the curtesy initiate. Continuing the discussion of the *Myers* case, and incidentally the case of *Teckenbrock v. McLaughlin*, supra, Judge WALKER, at page 353, said:

“The sole question upon which the language of the court could have any ruling force was one of preference between the creditors of the wife who had no lien, and the husband, as the owner of the estate by the curtesy consummate. This was independent of any consideration of the interest of the husband during the life of the wife. The expression, therefore, in that case, that curtesy initiate constitutes a vested interest cannot reasonably be construed as more than a passing remark, and being responsive to no issue is determinative of nothing. Otherwise construed, the effect of the *Myers* case is to declare that a husband can have a vested interest by the curtesy initiate in his wife’s real estate, contemporaneously with her power under the statute of 1889, to convey same and

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invest the grantee with an absolute fee therein. Such a construction limits the letter and destroys the purpose of the Married Woman's Act. It is repugnant to reason, and despite the remark made in *Teckenbrock v. McLaughlin*, 246 Mo. l. c. 717, that 'there are two lines of authority in this State on this question,' the rulings here and elsewhere will be found in accord with that in the *Hageluken* case. The *Teckenbrock* case did not attempt, nor was it necessary for it to define the nature of a husband's interest as a tenant by the curtesy initiate in his wife's property since the enactment of the Married Woman's Act. All that it did decide was that when suit was brought *by a husband and wife* to set aside a will, it could not be maintained on the ground of the husband's interest as tenant by the curtesy initiate in the property of his wife acquired by descent since the statute of 1889. That nothing therein gave any authority to the maintenance of an action of this character under Section 555, Revised Statutes 1909, defining who may contest the validity of wills; and for the additional reason that the issue was *res adjudicata*, in having been determined in a former proceeding identical in its character."

In the case of *Donovan v. Griffith*, 215 Mo. 149, the facts were that the wife died seized of the equitable title to land bought with her separate means. The husband had taken the legal title in himself. The issues involved were whether the husband had an estate by the curtesy in such land, the effect of the death of the child before seizin in the wife, and whether partition of the land could be had. Conveyance by the wife was not in the case. Fox, P. J., at page 162, said:

"In *Myers v. Hansbrough*, 202 Mo. 495, it was expressly ruled that the Married Woman's Statute, Section 4340, Revised Statutes 1899, which is the same as Section 6869, Revised Statutes 1889, did not further impair the rights of the husband's estate by the curtesy in land held by the wife as her separate equitable estate than to take away from the husband his common-law right to the possession and usufruct of the land during the life of the wife.

"Applying the doctrine as announced in the cases above indicated, it is clear that the law is well settled in this State that a husband is entitled to curtesy in the equitable separate estate of the wife, and the provisions of Section 4340, which is denominated the Married Woman's Statute, has in no way changed the rights of the husband other than to the extent as heretofore indicated."

This case cannot be regarded as out of harmony with the ruling in the Hageluken case, because the wife died seized of the property.

It appears from the above cases that there is a strong trend of opinion of this court toward the view that the Married Woman's Act has completely emancipated married women in respect to their separate property and that they now have full power under the Married Woman's Act to dispose of their separate real estate without joinder of the husband in the deed of conveyance. This is the ruling in the Hageluken case clearly and unqualifiedly. Some subsequent decisions have thrown some doubt about the rule laid down in that case without in any wise overruling or even seriously criticising it.

It is difficult to understand how full force and effect can be given Sections 8304 and 8309, Revised Statutes 1909 (Secs 7323 and 7328, R. S. 1919), without holding that, where the wife during her lifetime has conveyed her separate real estate, the estate of the husband, both by the curtesy initiate and by the curtesy consummate, in such property is thereby completely wiped out, regardless of his failure or refusal to join in her deed of conveyance. Only by so holding can her separate real estate be truly said to "be and remain her separate property and under her sole control." If, when dealing on her own account, she cannot contract debts which may be satisfied during her lifetime out of her separate real estate to the exclusion of her husband's present or prospective interest therein, then she cannot be truly said to be able to carry on and transact business on her own account as a *femme sole*. To declare that her husband has an indefeasible interest in her separate real estate, unless

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he has joined her in conveying same, is to put restrictions on her use of her separate property and to cripple her activities as a *femme sole*.

The argument that such construction gives the wife more rights in her husband's separate property than he has in hers is one that might be very persuasive if made to the Legislature. It has no place and can avail nothing as a legal argument before a court.

The rights of the husband by the curtesy consummate in the separate lands of wife of which she died seized are not involved here. In determining those rights in a proper case, full effect will necessarily be given to the provisions of Section 536, Revised Statutes 1909 (Sec. 506, R. S. 1919).

We hold as under the facts in this case that where the wife during her lifetime has conveyed her separate real estate without joining the husband in the deed of conveyance, the husband, after her death, cannot assert any interest in such real estate by virtue of being the surviving husband.

It follows that respondent had no right of possession or any interest in the premises in controversy at the time that the suit was filed or thereafter, and that the verdict of the jury was for the right party. The order of the trial court granting a new trial is reversed and the cause remanded with directions to set aside the order granting a new trial and to reinstate the judgment on the verdict of the jury.

All concur.

WARD ABERNATHY, by JAMES SHEPARD, Curator
of Estate of WARD ABERNATHY, v. MISSOURI
PACIFIC RAILWAY COMPANY, Appellant.

Division Two, March 9, 1921.

1. **JUDGMENT: Collateral Attack.** A judgment rendered by a court of another state possessing jurisdiction of the subject-matter and of the parties, cannot be collaterally attacked in the courts of this State.
2. ———: ———: **Fraud: Raised by Reply.** Plaintiff, a minor, sued in this State, by his curator, for damages for personal injuries received in Kansas. The defendant pleaded that the father of plaintiff had been appointed his guardian by the probate court of the county in which the accident occurred, that said guardian had instituted suit in the district court of said county, that counsel for both parties appeared and it was agreed that judgment should be rendered for plaintiff in a certain amount, that judgment in said amount was rendered, and that the amount had been paid to the clerk of said court for use of said guardian. In his reply, plaintiff alleged that the order of the probate court appointing plaintiff's guardian and the judgment of the district court were procured by fraud, deception and misrepresentation practiced upon those courts by defendant and were void, and that certain attorneys, mentioned in said judgment as counsel for the plaintiff, did not represent him in said courts. *Held*, that the courts of Kansas having jurisdiction of the parties and of the subject-matter of the cause of action, with full power to hear and determine it, and having heard and determined it by said judgment, and the amount having been paid to the clerk for the use of plaintiff's guardian, plaintiff cannot now successfully attack said judgment collaterally by allegations in his reply in the Missouri action to the effect that said judgment was procured by fraud and deception practiced by defendant upon the courts in the act of procuring said judgment; but said judgment is a bar to his said action.
3. ———: ———: **Errors Apparent on Face.** A judgment void on its face binds no one, but may be attacked collaterally in any court in which it is invoked. But a judgment rendered by a court of competent jurisdiction cannot be set aside in a collateral proceeding on account of mere irregularities or errors apparent on its face.

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4. ———: ———: **Attorneys: Power to Represent Plaintiff.** In a collateral attack on a former agreed judgment rendered in behalf of plaintiff, an allegation that certain attorneys did not represent him in said former action is effectually disposed of by a recital in said judgment that said attorneys appeared for him.

Appeal from Benton Circuit Court.—*Hon. C. A. Calvird*,
Judge.

REVERSED.

J. F. Green and *C. D. Corum* for appellant.

(1) This clearly was a collateral attack on these judgments, as is shown by the following authorities. *Johnson v. Realty Co.*, 167 Mo. 341; *State ex rel. v. Merchants & Miners Bank*, 213 S. W. 817; 14 Current Law, p. 390; *Gunby v. Cooper*, 177 Mo. App. 356. (2) The procedure here presented clearly constitutes a collateral attack on these judgments for fraud in the procurement of them and they are invulnerable to attack in this way. *State ex rel. v. Merchants & Miners Bank*, 213 S. W. 818; *Lovett v. Russell*, 138 Mo. 482; *Rivard v. Railroad*, 257 Mo. 168; *Maxwell v. Quinby*, 90 Mo. App. 473; *Abbingdon v. Townsend*, 271 Mo. 615; *State ex rel. v. Ross*, 118 Mo. 46; *Johnson v. Realty Co.*, 167 Mo. 339; *Morris v. Sadler*, 74 Kan. 892; *Simpson v. Kimberlin*, 12 Kan. 579; *Pritchert v. Madern*, 31 Kan. 38. (3) The facts alleged in plaintiff's reply are insufficient to justify the setting aside these judgments even in a direct proceeding. If plaintiff had sought, by his petition filed in the District Court of Crawford County, Kansas, to set the judgment rendered by that court aside and had based the right to do so on the averments contained in this reply, such petition would be demurrable. It is well-settled law that before a judgment can be set aside for fraud, even in a direct proceeding instituted for that purpose, that the plaintiff must allege and prove that fraud was practiced in the very act of procurement of the judgment. It will be noticed that the reply in this case does not allege any fact tending

to show any fraud in the procurement of the judgments rendered by the Kansas courts, but it is simply based on the alleged ground that fraudulent representations were made to the plaintiff's guardian which induced him to consent to the judgment entered in the probate court and to settle his case for an inadequate amount, and that these representations were made to him by defendant's agents outside of the court room and prior to the rendition of the judgments by the probate court, and, of course, prior to the rendition of the judgment in the District Court of Crawford County, Kansas. These averments would not satisfy the requirements of the law even in a direct proceeding assailing these judgments. *Murphy v. De France*, 101 Mo. 157; *Payne v. O'Shea*, 84 Mo. 133; *Hamilton v. McLean*, 139 Mo. 678; *Nichols v. Stevens*, 123 Mo. 96; *Story on Equity Juris.* (11 Ed.) sec. 1582; *Railroad v. Mirrieless*, 182 Mo. 126; *Fears v. Riley*, 148 Mo. 49; *McDonald v. McDaniel*, 242 Mo. 176; *Trust Co. v. Stoneware Co.*, 197 Mo. App. 148; *Cantwell v. Johnson*, 236 Mo. 600; *Wolf v. Brooks*, 177 S. W. 337; *McGillvray v. Assurance Co.*, 46 L. R. A. (N. S.) 110; *Crouse v. McVickar*, 207 N. Y. 213; *United States v. Beebe*, 180 U. S. 344, 45 L. Ed. 563. (4) The court erred in not giving the judgments of the probate and district courts of Kansas the full faith and credit required by Section 1 of Article IV of the Constitution of the United States. *Tootle v. Buckingham*, 190 Mo. 196; *Lieber v. Lieber*, 239 Mo. 29; *Railroad v. Deer*, 200 U. S. 176; *Harris v. Balk*, 198 U. S. 215; *Lindley v. Railroad*, 47 Kan. 432; *Morris v. Sadler*, 74 Kan. 892; *Anthony v. Halderman*, 7 Kan. 50; *Garner v. State ex rel. Moon*, 28 Kan. 790; *Pritchard v. Madren*, 31 Kan. 38.

C. W. Prince, E. A. Harris, W. S. Jackson, and James N. Berry for respondent.

(1) The so-called release and discharge is void *ab initio* for the reason that the "journal entry" shows upon its face that the plaintiff was a minor, that a "jury" was

"waived" and that judgment was based upon the "agreement" of the parties. The rights of infants can be extinguished only by legal proof; nothing can be waived; the guardian was utterly lacking in power to "waive" the substantial right of trial by jury, and the court was lacking in power to effectuate such waiver. *Revely v. Skinner*, 33 Mo. 101; *McClure v. Frithing*, 51 Mo. 109; *Le Bourgeoise v. McNamara*, 10 Mo. App. 119. (2) An infant is incapable of making an admission which can effect his rights, and for a stronger reason an admission of another person made on behalf of the infant cannot affect his rights. *Fink v. Railroad*, 161 Mo. App., 314, 143 S. W. 568. (3) A guardian is without power to waive or consent to anything in cases involving rights of minors. Full proof must be made. *Revely v. Skinner*, 33 Mo. 100; *McClure v. Farthing*, 51 Mo. 109; *Fink v. Railway*, 161 Mo. App. 324; *Railway Co. v. Lasca*, 79 Kan. 311. (4) The discharge proved by defendant was a mere "journal entry" furnished by defendant's counsel and filed in court. It lacked the verity of a judgment and was not signed until ten years after it was filed and then by a man whose judicial powers had terminated many years before, a mere afterthought and makeshift in a vain attempt to validate a worthless document. But in addition to this a judgment is not such until it is rendered, and in Kansas even after rendition, is not complete until the record itself is signed by the judge. 1909 Kan. Gen. Stat. secs. 6008, 6010. (5) But whether it be called a direct or collateral attack to impugn a judgment by an answer or reply our statutes expressly authorize that thing to be done. Sec. 1812, R. S. 1909. (6) Though collateral attack is permissible where the judgment is infected with a jurisdictional flaw, an attack in reply on a release pleaded in the answer is direct and not collateral and a *fortiori* an attack on a judgment so pleaded is direct and not collateral. *Harms v. Casualty Co.*, 172 Mo. App. 248; *Martin v. Turnbaugh*, 153 Mo. 172; *Wonderly v. Lafayette*, 150 Mo. 626; *Engler v. Knoblauch*, 131 Mo. App. 481. Fraud which goes to the jurisdiction of a court may be shown

in response, when a judgment entered by a court thus lacking jurisdiction, is sought to be enforced. Fraudulently simulating appearance by attorney is such a fraud, and judgments based thereon are open to collateral attack. *Palmer v. Bank*, 213 S. W. 873; *Marx v. Fore*, 51 Mo. 74; *Eager v. Stover*, 59 Mo. 87; *Napton v. Leaton*, 71 Mo. 358; *Hayes v. Merkle*, 67 Mo. 57; *Hayes v. Merkle*, 78 Mo. 383; *Hanks v. Hanks*, 218 Mo. 673. (8) In Missouri a foreign judgment may be attacked when set up, and the want of jurisdiction and fraudulent simulated appearance may be shown by response. If obtained by fraud and without jurisdiction it is no judgment at all and absolutely void and will be so declared if the fact is made to appear; the defense goes to its very existence. *Marx v. Fore*, 51 Mo. 74; *Palmer v. Bank*, 218 S. W. 873. (9) Citizens are not driven to foreign states to protect their rights. If they have a legal right, or are being subjected to a wrong they may look for protection to the tribunal having jurisdiction over them and the subject-matter, if the opposite party has placed himself within this jurisdiction. *Marx v. Fore*, 51 Mo. 74; *Palmer v. Bank*, 218 S. W. 873. (10) On objection of the defendant the court excluded the testimony of J. A. Van Houten, clerk of the District Court of Crawford County, Kansas, to the effect that the records and files of the court had been materially and unlawfully altered. The excluded proof is competent for this court to consider, because the respondent may point out errors committed by the trial court against him in order to sustain judgment in his favor. *Savings Bank v. Denker*, 205 S. W. 208. (11) The inference of authority arising from the words "attorneys for plaintiff" following the words "Curran and Curran" in the proceedings in the district court of Kansas was destroyed by the positive testimony of Burl Abernathy that he had not employed them. The issue thereon thus became *ipso facto* resolved in plaintiff's favor as a matter of law. *Guthrie v. Holmes*, 272 Mo. 215; *Mockowik v. K. C. Ry. Co.*, 196 Mo. 550.

MOZLEY, C.—This suit was instituted on the 13th day of February, 1917, in the Circuit Court of Benton

Abernathy v. Mo. Pac. Ry. Co.

County, Missouri, by Ward Abernathy, by the curator of his estate, James J. Shepard. The action was to recover damages for personal injuries sustained by plaintiff by being run over by a car being operated by the Missouri Pacific Railway Company at Cherokee, Kansas. The injury occurred on the 10th day of September, 1905. The petition states a common-law action for negligence, in that defendant negligently and carelessly backed a string of its cars on a side track with such force against a stationary car as to run it against and over plaintiff and so injury him that both of his legs had to be amputated, all of which, it is alleged, was done without the exercise of ordinary care, which, had it been exercised, would have disclosed plaintiff's presence and his situation of imminent peril. Recovery was sought under the humanitarian rule. The petition alleges that plaintiff was a minor, nineteen years of age, when the present action was brought, and that he was seven years of age when the accident happened,—thus disclosing a lapse of twelve years from the date of the accident to the date of the suit.

Defendant answered by general denial, a plea of contributory negligence that defendant railway was defunct, and plaintiff's father, Burl Abernathy, desiring to make a settlement with defendant, arranged with it to pay plaintiff the sum of \$250 and costs of a friendly suit, which was to be in full acquittance of all liabilities of defendant in the premises. To this end Burl Abernathy, father of plaintiff, was appointed guardian of plaintiff by the Probate Court of Crawford County, Kansas, the county in which the accident happened and the subsequent proceedings were had, on the 17th day of May, 1907, with full power under the laws of said State to collect, manage and dispose of said estate under the order of the court and to do and perform such acts as might be required of him by law or the decree, order, or judgment of any court of competent jurisdiction. Said guardian duly qualified in this behalf and was authorized to, and did, institute suit on May 17,

1907, in the district court of said county and, upon due appearance of both parties to said cause, the plaintiff by Curran & Curran, his attorneys, and defendant by J. J. Campbell, J. J. Richards and C. E. Benton, a hearing was had thereon (a jury being waived) upon the pleadings, evidence and agreement entered into between the parties, judgment was rendered in favor of plaintiff and against defendant for the sum of \$250 and \$8.40 costs. This sum was paid by defendant to the clerk of said court, for the use of plaintiff to his guardian. Defendant pleaded all the foregoing facts in bar of the present action. Some other matters, alleged to be defensive to the action are pleaded by defendant, but in the view we take of the matter they are immaterial and will not be further referred to.

Plaintiff's reply was a general denial of the averments of the answer; a plea that the action of the probate court, in appointing plaintiff's guardian, and of the District Court of Crawford County, Kansas, in rendering judgment for plaintiff, were both void and were procured by fraud, deception and misrepresentation practiced upon them by defendant; that Curran & Curran did not represent the plaintiff in the Kansas courts, and that the judge did not sign the judgment rendered.

I. Plaintiff filed a motion to dismiss the appeal herein on the ground that the assignments of alleged error were not sufficiently specific and distinct in
Assignments. alleging what the supposed error was and, hence, is too general to justify review by us. Under the holding of the later cases it is not necessary for assignments of error to be more specific and distinct than those of the instant case. [Wampler v. Railroad, 269 Mo. 1. c. 483; United Rys. Co. v. Reynolds, 278 Mo. 554.] We overrule said motion.

II. Defendant assigns as error the refusal of the court *nisi* to give its instruction, at the close of the testimony, directing a verdict in its favor. If this position is correct it will dispose of all other questions raised.
Directed Verdict.

III. The judgment of the District Court of Crawford County, Kansas, where the cause originated and was tried, omitting caption, reads as follows:

“Now on this the 17th day of May, 1907, that being a day of the regular May term, 1907, of said court, the above entitled case comes on for trial, plaintiff appearing by Curran & Curran, his attorneys, the defendant appearing by J. J. Campbell, J. J. Richards and C. E. Benton, its attorneys, and a jury having been waived, said cause is submitted to the court upon the pleadings, evidence and agreement of the parties, on consideration whereof the court finds for the plaintiff, and finds that plaintiff is entitled to recover the sum of two hundred and fifty dollars and costs of suit. It is therefore considered, ordered and adjudged by the court that said plaintiff have and recover of and from said defendant, the Missouri Pacific Railway Company, the sum of two hundred and fifty dollars and costs herein, taxed at \$8.40.

“ARTHUR N. FULLER, Judge.”

Where a court of another state having jurisdiction of the person and subject-matter of the cause of action and full power to hear and determine it and, in pursuance thereof, does hear and determine it by rendering the judgment above set out which was duly paid to the clerk of said court, for the use of plaintiff, to his guardian (therefore duly appointed by the probate court of the county and state where said cause was pending), can the plaintiff successfully collaterally attack said judgment by alleging in his replication that it was procured by fraud, deception and misrepresentation practiced by defendant?

The probate court of Kansas had jurisdiction over the subject-matter before it and likewise jurisdiction over the person of Ward Abernathy.

In this collateral attack, the judgments and orders of said court are conclusive and cannot be called in question here. [Pritchard v. Madren, 31 Kan. 38; Morris v. Sadler, 74 Kan. 892; Smith v. Clausmeier, 136 Ind. 105; Oldaker v. Spiking, 210 S. W. 1. c. 62, and cases cited;

Wright v. Hetherlin, 209 S. W. 1. c. 874; Thompson v. Pinnell, 199 S. W. 1. c. 1013; Harter v. Petty, 266 Mo. 296.]

It is not necessary to cite authorities on the proposition that a judgment void on its face binds no one and may be collaterally attacked whenever or wherever it comes in the way.

But on the other hand, where the record shows on its face that the court had jurisdiction over the person and subject-matter and hears the cause and renders a judgment fair on its face, the rule is the reverse. See Kansas cases above cited and State ex rel. v. Ross, 118 Mo. 23; Lovitt v. Russell, 138 Mo. 474; Johnson v. Realty Co., 167 Mo. 325; Fitzgerald v. DeSoto Special Road Dist., 195 S. W. 695; Rivard v. Railroad, 257 Mo. 135, 1. c. 168; Abington v. Townsend, 271 Mo. 1. c. 615; Johnson v. Merchants' & Miners' Bank, 213 S. W. 815-16-17; 15 R. C. L. p. 835; State v. Case & Sipes, 217 S. W. 309; Boas v. Branch, 208 S. W. 1. c. 86; State ex rel. v. Patton, 271 Mo. 1. c. 559.

Nor can a judgment rendered by a court of competent jurisdiction be set aside in a collateral proceeding on account of mere irregularities or errors even where these appear of the face of the record. [15 R. C. L. p. 859; Smith v. Clausmeier, 136 Ind. supra; State ex rel. v. Brandhorst, 156 Mo. 457; Gould v. Sternberg, 128 Ill. 510; Hine v. Morse, 218 U. S. 493; Fauntleroy v. Lum, 210 U. S. 230; Johnson v. Realty Co., supra.]

Nor does the contention made by plaintiff that Curran & Curran did not represent him in his former suit in which he recovered damages against defendant, and which was paid to his guardian as above set out, and that said district court neglected to sign the judgment rendered, in anywise alter the situation. Both are effectually disproved by the recitals of the record and judgment in the cause.

As above pointed out plaintiff's attempted attack on the validity of the appointment of said guardian and upon said judgment are collateral, and cannot be maintained in

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the present action, and it is our conclusion that defendant's peremptory instruction should have been given.

Let the case be reversed. *Railey and White, CC.*, concur.

PER CURIAM:—The foregoing opinion of MOZLEY, C., is hereby adopted as the opinion of the court. All of the judges concur.

THOMAS H. COBBS v. JOYCE-WATKINS COMPANY,
P. R. WALSH TIE & TIMBER COMPANY et al.,
Appellants, and McCAULL-DRYER TIE COMPANY,
Respondent.

Division Two, March 19, 1921.

1. **FREIGHT RATES: Overcharges: As Between Agent and Consignee.** Where the purchaser bore the burden of transportation and paid all the freight charges on railroad ties bought by his agent on commission, as between them he, and not such agent, is entitled to all overcharges made by the railroad.
2. ———: ———: **As Between Vendor and Purchaser.** Where the price of the railroad ties to the vendors was the price at the station of destination less the freight charges from the loading station to said destination, and the vendors were paid that price, the freight charges being paid by the consignee, such vendors are not entitled to recover the excess in the overcharge of freight rates made by the railroad.
3. ———: ———: ———: **F. O. B. Destination.** The term "f. o. b. St. Louis," if used at all in the contract for the sale of railroad ties in this case, was not used in its ordinary commercial sense; but the uniform manner of delivery, inspection, acceptance and payment of the purchase price, the assumption of the trouble and expense, by the agent of the purchaser, of ordering cars, loading the ties and paying the freight, and the fact that the vendors had no further interest or concern in the ties or their transportation after they were placed in the loading station yard, inspected and accepted, rebut the implication that the term "f. o. b. St. Louis" was understood as implying that the freight charges should be at the cost of such vendors, and on that term no judgment that they were, as between them and said purchaser, entitled to the excess of the overcharges made by the railroad company can be based.

4. ———: ———: ———: **Bill of Sale: Proof.** Bills of sale, executed by the seller of railroad ties, in which is set forth the name of the buyer, the number of ties sold, the price, the date and number of car by which shipped, and nothing more, while not required by law, the sales and deliveries being complete without them, and the acceptance in payment of drafts from the purchaser which recite that they are given for the purchase price and in settlement of said bills, in the absence of fraud or imposition, characterize the transaction, and furnish indubitable proof that the sellers were not chargeable with the freight charges, and are not entitled, as between them and the said purchaser, to the excess of overcharges in the freight rates made by the railroad and paid by said purchaser.
5. ———: ———: ———: **Agreed Freight Rate.** Where the seller and purchaser agreed on the price of ties at the station of destination, basing the price on a certain freight rate, if the rate was lower than that rate the seller to have the benefit of it, and if higher he was to stand it, and settlement was made on that basis, the seller is entitled to the excess of overcharges in the freight rate made by the railroad company.

Appeal from St. Louis City Circuit Court.—*Hon. Benjamin J. Klene*, Judge.

AFFIRMED.

F. W. Bull, Harry A. Frank and Arthur S. Lytton for appellant, Joyce-Watkins Co.

(1) The arrangement with the McCaull-Dryer Tie Company was the same as with the other vendor defendants, and was a contract for the sale of the ties, not delivered f. o. b. St. Louis, and the actual freight charges thereon deducted from the selling price, but a contract, recognized and carried out by the parties, payment made by the Joyce-Watkins Company, that the McCaull-Dryer Tie Company should receive a certain price for the ties at said loading station. (2) The acceptance of the draft in payment of said ties, reciting "in full payment of material named in bill of sale of this date and number" and the written endorsement of the McCaull-Dryer Tie Company on said

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draft, created a written contract between said parties, into which was merged any anterior verbal understanding. (3) The acceptance of the drafts by the McCaull-Dryer Tie Company discharged the fund and securities as well as the Joyce-Watkins Company from any and all claim it now asserts. (4) The McCaull-Dryer Tie Company is now estopped by its conduct and the actions of its agent, Dahlberg, from asserting any claim against this fund or the Joyce-Watkins Company. (5) The counsel for respondent admits that the contract with the Walsh Company and McCaull was the identical arrangement as was made with the other defendants.

E. T. & C. B. Allen for respondent, P. R. Walsh Tie & Timber Co.

(1) The only person entitled to recover the overcharges is the one who made the contract of affreightment, and from whom their exaction was made. *McGrew Coal Co. v. Railroad*, 217 S. W. 986; *Southern Pacific Co. v. Lumber Co.*, 245 U. S. 531; *State v. Ry. Co.*, 81 Vt. 46; 3 *Michie on Carriers*, pp. 1150-51. (2) If it is the intention of the parties that the one is to purchase on his own behalf and sell the goods to the other, the transaction is a contract to sell. *Kelly v. Sibley*, 137 Fed. 586; *Black v. Webb*, 20 Ohio 304; *Moors v. Kidder*, 106 N. Y. 32; *Bank v. Logan*, 74 N. Y. 568; *Simonds v. Wrightman*, 36 Ore. 120; 31 *Cyc.* 1204. (3) The one who directly bore the burden of transportation is the one entitled to the overcharges. *Jennison v. Dixon*, 133 Minn. 268. (4) The Watkins Company was not the real party in interest, and cannot recover. (5) Whether the Walsh Company was a vendor or an agent is not solely a question of fact; it is also a question of law. (6) The law presumes that a person is acting for himself and not as the agent of another, and unless there is proof either that the agency is a general continuing agency to endure until revoked, or that the agent fills some character from which such a general agency may be presumed, the fact that there has been a sep-

arate former agency for a different or even a similar purpose, does not raise a presumption of agency as to any subsequent transactions. 2 C. J. 920, sec. 648.

T. L. Philips and Arnold Just for interpleaders.

(1) The parties having used the expression f. o. b. St. Louis in their contracts, the court should give these terms their usual meaning unless good reason to the contrary is shown. *Heman Const. Co. v. City*, 256 Mo. 339; *Liggett v. Levy*, 223 Mo. 601; *Kansas City v. Pub. Serv. Comm.*, 210 S. W. 385; 13 C. J. 531. (2) These appellants sold the ties "f. o. b. St. Louis" and bore the burden of transportation, and are in equity and good conscience entitled to the overcharges. *Jennison Bros. v. Dixon*, 133 Minn. 268.

HIGBEE, P. J.—On March 13, 1909, the P. R. Walsh Tie & Timber Company entered into a contract with the Joyce-Watkins Company by which the Walsh Company undertook to act as exclusive agent for the Watkins Company in purchasing railroad ties in the States of Missouri, Arkansas and Louisiana for a commission of two cents per tie. This contract was to be in force for one year. The Walsh Company bought ties at various points on the line of the St. Louis & San Francisco Railroad in Missouri. The ties were inspected by the Burlington Railroad Company in the field, and by direction of the Watkins Company were billed to the Burlington Railroad Company at St. Louis, where that company received them, and paid the freight charges which were refunded by the Watkins Company when settlement was made for the ties. After the expiration of the year, the Burlington withdrew its inspectors from the field, and established a yard in St. Louis, to which ties were shipped and inspected by the Burlington. The Walsh Company thereafter continued purchasing ties, making its own inspection in the field. Ties were purchased at various points on the line of the

Frisco Railroad from the other interpleaders and billed to the Watkins Company at St. Louis over the Frisco road.

The Frisco Railroad Company had sued out a writ of injunction at St. Louis restraining the state officials from enforcing the maximum freight rates established by Section 3241, Revised Statutes 1909. This was dissolved by the United States Supreme Court on appeal in May 1913. Thereafter, on May 27, 1913, the federal court at St. Louis appointed receivers for the Frisco Railroad Company. Straightway the Watkins Company filed a claim in said court for alleged overcharges exacted by the Frisco Railroad for carrying the ties above mentioned, specifying the cars, dates of shipment and the excess charges paid on each car. The Walsh Company and all of the other interpleaders, except Hughes and Weatherford, filed similar claims. These claims were adjusted, so that on October 5, 1917, there was paid to the plaintiff, as trustee for all claimants, cash and interest bearing securities of the face value of \$99,418.32. On November 12, 1917, plaintiff filed in the circuit court of the city of St. Louis, a petition in the nature of a bill of interpleader against all of the defendants who were severally asserting conflicting claims to all or portions of said funds. These various claims were for overcharges exacted prior to May 27, 1913, the date of the Frisco receivership. Thereupon the above-named defendants filed their separate answers and interpleas, admitting the allegations of the petition and asserting their respective claims in the matter of the overcharges paid to the Frisco Railroad Company. Answers and replies were filed by the several interpleaders. The issues thus framed were submitted by the court to the Honorable Davis Biggs, as referee, who heard the evidence and on March 10, 1919, submitted his report and findings on the evidence taken before him. Exceptions to the report were overruled, the report approved, and judgment rendered in accordance therewith. All of the parties, except the McCaull-Dryer Company, appealed.

I. The referee states the several claims of the interpleaders as follows:

"At the argument and in the briefs of counsel it is conceded by all of the various defendants that the claims of each to the overcharges as set forth in 'Exhibit A' attached to the intervening petition of the Joyce-Watkins Company are as follows:

"1. The Joyce-Watkins Company claims all of said overcharges, to-wit, \$111,941.35.

"2. All of the defendants concede that of the said overcharges the Joyce-Watkins Company is entitled to the sum of \$22,093.58.

"3. As against the Joyce-Watkins Company the Walsh Company claims the sum of \$86,776.12.

"But of this sum and as against the other defendants, Johnson et al., the Walsh Company only claims the sum of \$40,388.24, conceding that between it and the defendants, Johnson et al, each of said defendants is entitled to the amount claimed by them, respectively, which claims of the other defendants are as follows:

"Schneider Brothers	\$ 478.88
McCaull-Dryer Tie Company.....	452.70
Hughes.....	3,141.60
Angerer.....	9,087.83
Weatherford.....	2,675.56
Abeles.....	4,852.86
Johnson.....	26,696.56
Fisher Brothers.....	2,076.33

"The Walsh Company makes no claim to any overcharges on cars shipped prior to June 15, 1910, the time that the defendant Joyce-Watkins Company established a tie yard in the City of St. Louis, which shipments aggregate the sum of \$25,166.02."

Walsh, the president of the Walsh Company, had been buying ties for the Watkins Company since some time in the year 1908. On March 13, 1909, the Walsh Company, as first party, and the Watkins Company, as second party, entered into a written contract which contains the following provisions:

Overcharges:
As Between
Agent and
Consignee.

the year 1908. On March 13, 1909, the Walsh Company, as first party, and the Watkins Company, as second party, entered into a written contract which contains the follow-

"The first party, without expense to the second party, is to act and will use its best endeavors as the exclusive agent of the second party in the states of Missouri, Arkansas, Oklahoma and Louisiana, for the purchase of all kinds of railroad ties.

"Second party is to pay first party a commission of 2c on each railroad tie which the first party shall buy for the second party in any of the said four states at a price and on terms which shall be satisfactory to the second party."

Walsh purchased ties from the other interpleaders at points along the line of the Frisco Railroad. Walsh and the defendants from whom he bought ties testified that he purchased them f. o. b. St. Louis, on the basis of the St. Louis price. Walsh deducted from this price the freight from the loading stations to St. Louis, sometimes giving the sellers a check drawn by the Walsh Company on its own funds, but generally giving a draft on the Joyce-Watkins Company for the difference between the St. Louis price and the freight rates as charged by the railroad company. At first some of the sellers waited until the freight bills were returned before the settlement was made. Finally, to save delay, it was agreed that the average weight of the ties was 150 pounds each, and the freight was reckoned on that basis. Settlement was then made accordingly by draft as aforesaid. Usually a bill of sale was made by the seller of the ties, of which the following is a sample:

"Date Sept. 22nd, 1910.

No. 17516.

"The undersigned hereby sells to Joyce-Watkins Co., of Chicago, Ill., the following described material, certifying that the same is free from all liens and encumbrances of any character:

"Located at Anaconda, Mo.

"1185 No. 1 R. O. ties at 33 $\frac{1}{2}$ c.....\$396.97

"180 No. 2 R. O. ties at 16 $\frac{3}{4}$ c.....30.15

1365

427.12

"Frisco 82215 1/431, 2/69

"Frisco 82669 1/392, 2/73

"Frisco 49762 1/362, 2/38

"J. W. JOHNSON, Vendor."

The Walsh Company, as stated, makes no claim for the overcharges exacted prior to June 15, 1910, admitting that it was acting as purchasing agent during that period. It claims, however, that on the expiration of the contract of March 15, 1909, it made a new verbal contract with the Watkins Company which was put in writing on June 27, 1913, a month after the appointment of the receivers, and that under that contract the Walsh Company ceased to act as agent for the Watkins Company and expressly bound itself to pay all freight charges on ties it thereafter purchased for and shipped to the Watkins Company, and that the Walsh Company is, therefore, entitled to the overcharges paid after June 15, 1910, when the tie yard was established in St. Louis. The referee found that issue against the Walsh Company.

There was conflicting evidence on this point. Frank W. Werner, secretary of the Watkins Company, and A. R. Joyce, assistant secretary and assistant treasurer thereof, testified that there was no new contract entered into with the Walsh Company, and that Walsh continued to buy ties as agent for the Watkins Company on a commission of two cents per tie. The change in their method of conducting business was that after June 15, 1910, the Burlington inspectors were withdrawn from the field, Walsh inspected the ties, drew drafts on the Watkins Company for the cost of the ties at the loading points, paid the freight to the Railroad Company by drawing drafts on the Watkins Company therefor, and the commissions were settled monthly. The books of the Walsh Company, which were introduced, showed that it continued during the whole period to charge the Watkins Company with commissions at two cents per tie, which were settled monthly.

The testimony of Walsh, taken at the former hearing, was read in evidence. We quote from that as follows:

"Q. How long did you continue to operate under that contract? A. One year.

"Q. At the end of one year what then happened? A. Well, we continued doing business right along practically on the same method."

We think the referee was clearly warranted in finding that the Walsh Company bought the ties as agent for the Watkins Company after, as well as before, the expiration of the contract of March 13, 1909, and that it paid all the freight charges on the ties bought by the Walsh Company prior to May 27, 1913.

It was admitted by Walsh before the referee that the Watkins Company was entitled to all overcharges on ties purchased by the Walsh Company as its agent. The Watkins Company paid all the freight charged by the Frisco Railroad. It was, in fact, both consignor and consignee. It bore the burden of the transportation and, as against the Walsh Company, is clearly entitled to recover the overcharges.

In *Jennison Brothers v. Dixon*, 133 Minn. 268, the facts were: Dixon, a merchant at St. Charles, at various times bought flour and feed from the plaintiff in car-load lots at Janesville, to be delivered by plaintiff at St. Charles, at an agreed price per barrel for flour and per ton for feed. Defendant paid the freight bills and was credited therefor on the purchase price. It developed that the freight charges were in excess of the legal rates. The excess was refunded by the railroad to the defendant. Plaintiff sued to recover the money so refunded. It was held that, as plaintiff had borne the excess of such transportation, he was entitled to recover, citing *State v. Central Vermont Ry. Co.*, 81 Vt. 459, 71 Atl. 193, 21 L. R. A. (N. S.) and other cases.

This question was considered by this court in *McGrew Coal Co. v. Mo. Pac. Ry. Co.*, 280 Mo. 466. In that case plaintiff had quoted to its customer a price for coal f. o. b. destination. The coal was shipped by plaintiff from Myrick to Blackwater, points on defendant's railroad. The court said, at page 475:

"The stipulation stated that the plaintiff, instead of quoting to his customer a price for the coal f. o. b. at Myrick, quoted a price delivered at its destination. This means that the coal was sold to the consignee f. o. b. at the station of destination. When the coal was delivered the purchaser paid the illegal freight bill and settled his account with the plaintiff by sending him the defendant's receipt for the amount of freight paid, with the balance in cash. The transaction of sale stated in the stipulation was a simple one. According to its terms the less the purchaser of the coal paid for freight the more the plaintiff received in net proceeds from the transaction. The more he paid for freight the less the plaintiff received for his coal.

"The stipulation states that plaintiff's quotation to the purchaser 'was based upon the price at Myrick, plus the freight rate charged by the defendant.' This is probably true. The value of all commodities is based on all the conditions of cost, including transportation. When the consignee of this coal sold some or all of it to his customer, he no doubt based the price upon the cost of the coal in his yard, including the illegal charge paid to the defendant, but this would not transfer the right to bring the suit for the overcharge. We cannot see that the plaintiff stands on any different footing from that upon which it would stand had it paid the freight in advance. While it would, no doubt, then take it into consideration as an element in the selling price of his commodity, that fact would have no effect upon the liability of defendant for the illegal exaction.

"This litigation illustrates the just and salutary operation of the rule. The defendant had the physical power to enforce its illegal claim by withholding the delivery. The right of each consumer upon whom the burden ultimately falls to pursue the tortuous course of litigation which has resulted from these transactions would be a barren one. The remedy, to be effective, must lie with the shipper with whom the contract is made, and the amount of the recovery measured by the amount which

he is, either directly or through his consignee, forced to pay. This conclusion is well supported by the authorities. [Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531, 38 Sup. Ct. 186, 62 L. Ed. 451, 221 Fed. 890, 137 C. C. A. 460; Burgess v. Freight Bureau, 13 Interest. Com. Comn. R. 668, 680; Jennison v. Dixon, 133 Minn. 268, 158 N. W. 398.]”

II. We come now to the consideration of the claims of the other defendants (except that of the McCaull-Dryer Co). Their testimony and that of Walsh was

Overcharges: that the ties were sold on the basis of the St. Louis prices, f. o. b. St. Louis. As previously stated, some of these defendants preferred

As Between Vendor and Consignee. to wait until the freight bills were returned, when the representative of the Walsh Company deducted the freight from the St. Louis price and paid the seller the difference. To avoid the delay incident to this course of dealing, by mutual consent, they adopted the plan of reckoning the freight on the basis of 150 pounds per tie, which all agreed was the average weight. On each delivery of ties at the loading stations the freight was accordingly deducted from the St. Louis price and the difference paid to the seller, as the price of the ties, by drafts, as heretofore stated. Usually, but not always, each of the defendants at the time signed a bill of sale to the Watkins Company for the ties so delivered. They were then loaded by representatives of the Walsh Company at its expense and consigned in the name of that company to destination. This method, we think, was adopted to fix the price of the ties at the loading stations. We quote from the testimony of one of the defendants:

“Q. Mr. Angerer, you stated that this price that Walsh gave you was the St. Clair price: what did you mean by that? A. Well, my price, to arrive at a St. Clair price we took the St. Louis price on the ties and then took the freight rate from St. Clair on the basis of a hundred and fifty pounds to the tie and deducted it. That left us the St. Clair price.”

The defendants took their money and had no further interest or concern about the ties. They were in no sense shippers. They did not load nor incur any of the trouble or expense of loading, nor assume the obligation or relation of consignors. If the ties had been lost or destroyed in transit, would the loss have fallen on them? Had either of them the right of stoppage *in transitu*? If the freight paid had proven to have been less than the legal rate, would these defendants have been liable in an action by the carriers to recover the undercharge? [Mobile and Ohio Railroad Co. v. Laclede Lumber Co., 216 S. W. 798.] Under the undisputed testimony the referee was right in holding that the title passed to and vested in the Watkins Company at the time of each delivery and settlement at the loading stations. The delivery was complete, the purchase price was paid, the contract was executed.

III. It is, however, contended that the contract of sale, in its inception, was made on the basis of the St. Louis price f. o. b. St. Louis, and that this term of the contract is determinative of the issue. If that

F. O. B. Destination.	be true, then it follows that the ties while in transit were at the risk of these defendants.
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We think that the course of dealing shows that these words were not intended to be used, if they were used at all, in their ordinary commercial sense. The uniform manner of delivery, inspection, acceptance and payment of the purchase price, the assumption of the trouble and expense by the Walsh Company, as agent of the Watkins Company, of ordering cars, loading ties, payment of freight, and the fact that these defendants had no further interest or concern in the matter, rebut the implication that the words "f. o. b. St. Louis" were understood as implying that the freight charges should be at the cost of the sellers of the ties. [United States v. Andrews, 207 U. S. 229-241.]

But the stubborn fact remains that on the delivery of the ties the seller, not always, as claimed by the Watkins Company, but usually, executed a bill of sale to

that company, reciting the price paid and specifically describing the ties sold and delivered. The drafts also recited that they were given for the purchase price.

While these sale bills were not required by law and the sales and deliveries were complete without them, still they cannot be brushed aside as merely intended to

Bills of Sale. identify the particular ties delivered, as contended by counsel. In the absence of fraud or imposition they definitely and conclusively characterize the transactions. They furnish indubitable proofs of the execution of the contracts according to their terms. Judge LAMM well said: "When men sit down to put a contract in writing and do so the presumption is they write all there is of it. All prior or contemporaneous verbal conversations relating to the subject-matter are merged in the writing." [Beheret v. Myers, 240 Mo. 58, l. c. 75.] Further citations on a proposition so elemental would be mere affectation of learning.

IV. There is no merit in the objection that the bills of sale do not specify either time or place of delivery. They bear witness to executed, not executory, contracts. The sales and deliveries were accomplished. We quote from the report of the referee:

"In those instances where the defendants did not accept drafts and execute bills of sale, they nevertheless delivered the ties to the Walsh Company at the loading stations and gave up their title there. The legal effect of such method of business was to make these transactions sales at the loading stations, and not even f. o. b. cars at the loading stations, at the St. Louis price at the then rate of freight charged by the railroad, estimating each tie to weigh 150 pounds.

"This cannot be said, however, of defendant McCaull Company. Mr. McCaull testified that he and Walsh agreed on a price for the ties at St. Louis, basing it on an $8\frac{1}{2}$ cent freight rate; that if the rate was lower than $8\frac{1}{2}$ cents he was to have the benefit thereof; if it was over he would have to stand for it. It is undisputed that the

method of carrying on the business with the McCaull Company was different than with the other defendants, in this, that the McCaull Company always rendered invoices to the Walsh Company for the St. Louis price, less the freight charges, after the ties were shipped. The Walsh Company would pay such invoices by mailing the McCaull Company a draft on Joyce-Watkins Company."

The conclusion of the referee is that the McCaull-Dryer Company was entitled to judgment for the overcharges exacted on the shipment of the ties sold by it. Walsh, as agent of the Joyce-Watkins Company, contracted with McCaull. In legal effect, that company and McCaull mutually agreed on a price for the ties at St. Louis, basing it on an 8½ cent freight rate; if the rate was higher, McCaull would "stand for it," if it was lower, "McCaull was to have the benefit thereof." The contract was mutually obligatory.

It therefore results that the judgment of the circuit court should be and is affirmed. All concur.

THE STATE v. MIKE RUDDY, Appellant.

Division Two, March 19, 1921.

1. **INDICTMENT: Perjury: Materiality of Question.** At common law, a general allegation in an indictment for perjury that the question asked the witness in an investigation before a grand jury was material was insufficient, but it was necessary that it state facts showing its materiality; but under the statute (Sec. 3132, R. S. 1919) such general allegation is sufficient, and it is only necessary to allege that the matter or testimony alleged to be false was material to a certain matter or issue named, without setting forth the particular facts showing its materiality.
2. ———: ———: **Explicit Charge: Statute of Jeofails.** Where the question asked of Ruddy by the grand jury was, "Have you been in the home of Jim Benvenuto and Sadie Benvenuto within the last twelve months?" an indictment charging that "whereas, the said grand jurors charge that in truth and in fact the said Mike Ruddy had been frequently in the said house in which the said

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Jim Benvenuto and Sadie Benvenuto had lived for the past twelve months" and that "the said Mike Ruddy at the time of giving said testimony well knew that on several occasions within the last twelve months he had gone into the said house in which said Jim and Sadie Benvenuto were then and there so living," while it does not specifically allege that Ruddy had been in the house of the Benvenettos, but only in the house in which they lived, and does not positively allege that he had been in the house where they lived, but only knew he had been there, is sufficient under and its defects are cured by the Statute of Jeofails (Sec. 3908, R. S. 1919), which declares that no indictment shall be deemed invalid for omissions or irregularities "for want of an allegation of the time or place of any material fact, when the time and place have once been stated," nor "for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant." The indictment does fail to contain an allegation of "the time or place of a material fact," and it has a "defect or imperfection" similar in character to such omission, and these defects are cured by the statute. So also had "the time and place once been stated in the indictment" in this case.

3. **PERJURY: Evidence: Materiality.** Where the grand jury was inquiring whether intoxicating liquors had been unlawfully sold at the house of Jim and Sadie Benvenuto, a question asked of Ruddy whether he had been in said house within the last year was material, and a false answer constituted perjury. A case may be built up step by step, and one of the steps in making out the case of unlawful sale of intoxicating liquor at said house was to show that the witness visited the place where the liquor was being sold, and if he denied being there it was useless to ask him if he saw the sale of it.

Appeal from Adair Circuit Court.—*Hon. James A. Cooley*, Judge.

AFFIRMED.

W. F. Frank for appellant.

(1) Motion to quash the indictment should have been sustained. (a) For the reason that the indictment does not contradict the alleged false testimony of the defendant. There is no special averment negating the matter set out in the indictment. (b) Because it does not appear from the face of the indictment that the alleged false testimony was material to the investigation being

conducted by the grand jury, and because no facts are set out from which the court could determine the materiality of the alleged false testimony. *State v. Coyne*, 214 Mo. 344; *Kelley's Crim. Law* (3 Ed.) sec. 828; *State v. Morgan*, 225 S. W. 130. (2) Defendant's instruction in the nature of a demurrer to the evidence should have been given, because the State's evidence did not show that the alleged false testimony was material to the investigation being conducted and because the evidence did not show whether or not defendant's presence in the house in question was material to the investigation being conducted. *State v. Holden*, 48 Mo. 93; *State v. Keel*, 54 Mo. 182. (3) Defendant's presence in the house in question would not be material unless he, while there, learned some fact bearing on the question as to whether or not the parties living in the house were selling intoxicating liquor illegally. If defendant while in said house learned such facts it should have been alleged and proven. Where the materiality depends upon a number of facts it becomes a mixed question of law and fact to be submitted to the jury with proper instructions. 22 Am. & Eng. Enc. Law, 688. (4) Members of the grand jury who found the indictment against accused should not have been permitted to testify to anything except what accused said in the grand jury room before them. R. S. 1909, sec. 5086; *State v. Thomas*, 99 Mo. 235; *State v. Whelehon*, 102 Mo. 17. (5) Instruction one, given at the request of the State, should not have been given, because it authorized the jury to convict defendant, if they found that accused had been in the house in question within twelve months prior to January 22, 1919, when the information does not charge that accused had been in said house within said period of time. The instruction injects an issue into the case not made by the indictment.

Frank W. McAllester, Attorney-General, and *Henry B. Hunt*, Assistant Attorney-General, for respondent.

(1) The motion to quash the indictment was properly overruled, as the indictment is sufficient in form

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and substance. (a) The indictment contains a sufficient allegation relative to the adoption and existence of the Local Option Law in Adair County, outside the City of Kirksville. Art. III, Chap. 63, R. S. 1909; State v. Searcy, 39 Mo. App. 399; State v. Searcy, 46 Mo. App. 427; State v. Zehnder, 182 Mo. App. 167; State v. Dugan, 110 Mo. 143; State ex rel. v. Robertson, 262 Mo. 619. (b) Said indictment sufficiently alleges the court and term; the summoning and impaneling of the grand jury; that George Leavitt was the foreman of said grand jury and had lawful authority to administer an oath; that said grand jury on the 22nd day of January, 1919, at and during the January Term, 1919, of the Adair County Circuit Court, being duly sworn and charged to inquire within and for the body of the County of Adair, had under investigation certain alleged violations of the Local Option Law; that on said 22nd day of January, 1919, appellant was sworn by said foreman as a witness before said grand jury; that it was a material question whether said appellant had entered the dwelling of Jim and Sadie Benvenuto within twelve months prior to said January 22nd, they, the said Benvenettos, then and there being under investigation relative to their alleged sales of intoxicants at their dwelling in Adair County, Missouri outside the City of Kirksville, within said twelve months; that appellant denied being in said dwelling during the period aforesaid; the assignment of perjury. Sec. 4344, R. S. 1909; Sec. 4350, R. S. 1909; State v. Ackerman, 214 Mo. 327; State v. Faulkner, 175 Mo. 553, 565; State v. Faulkner, 185 Mo. 679; State v. Walker, 194 Mo. 376; State v. Gordon, 196 Mo. 198; State v. Nelson, 146 Mo. 259. (c) The indictment properly alleges the materiality of the issue with reference to which perjury was assigned. Appellant's demurrer was properly overruled. Sec. 4350, R. S. 1909; State v. Powers, 136 Mo. 196; State v. Nelson, 146 Mo. 261, 264; State v. Walker, 194 Mo. 370, 376; State v. Gordon, 196 Mo. 198; State v. Cave, 81 Mo. 454. (2) The trial court did not err in permitting members of the grand jury who returned the indictment

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at bar, to testify that numerous complaints had been made to the grand jury that the Benvenettos had been selling intoxicants in violation of the Local Option Law; and that said grand jury was investigating said complaints. Sec. 5069, R. S. 1909; Sec. 4350, R. S. 1909; Sec. 5086, R. S. 1909; Kelley's Crim. Law, Sec. 163; State v. Ackerman, 214 Mo. 332; State v. Faulkner, 175 Mo. 556; State v. Thomas, 99 Mo. 260. (3) The trial court did not err in permitting the foreman of said grand jury to read from "Kelley's Criminal Law and Practice" the oath he administered to appellant. Sec. 5070, R. S. 1909; 30 Cyc. 1446, 1450; Sec. 6353, R. S. 1909; State v. Bennett, 102 Mo. 373; Kelley's Crim. Law, sec. 149. (4) Error was not committed, in permitting members of said grand jury to testify that appellant was repeatedly asked the question with reference to which perjury was assigned. State v. Blize, 111 Mo. 473. (5) The question with reference to which perjury was assigned was a material question, and the evidence so shows. State v. Ackerman, 214 Mo. 332; State v. Jennings, 278 Mo. 552; State v. Hardiman, 277 Mo. 223. (6) A general assignment of error with reference to instructions presents nothing for review. State v. Rowe, 271 Mo. 94; State v. McBrien, 265 Mo. 605; State v. Selleck, 199 S. W. 130.

WHITE, C. —The appellant in the Circuit Court of Adair County, was convicted of the crime of perjury, and his punishment assessed at two years' imprisonment in the penitentiary.

He was charged with having sworn falsely in a matter pending before the grand jury of Adair County. At the January term, 1919 of the circuit court of that county, a grand jury had under investigation violations of the Local Option Law. It was admitted that the Local Option Law was in force in Adair County, outside the City of Kirksville. Complaints had been made to the grand jury that Jim Benvenuto and Sadie Benvenuto, within a year before the investigation was made, had been selling liquor at their home in the City of Novinger

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in Adair County, outside the corporate limits of the City of Kirksville. The defendant was brought before the grand jury, sworn, and asked this question:

"Have you been in the home of Jim Benvenuto and Sadie Benvenuto in the City of Novinger in Adair, County, Missouri, within the last twelve months?" Ruddy answer the question, "No." Several members of the grand jury testified that he was several times asked the question and answered it in that manner. Four witnesses testified to having seen the defendant go into the Benvenuto home at various times between January 22, 1918, and January 22, 1919—the day on which the question was asked.

The assignments of error on which the appellant seeks a reversal relate to the sufficiency of the indictment and the evidence offered, showing the materiality of the question, which brought the alleged false answer.

I. It is first claimed that the indictment does not allege with particularity any facts which would show it was material to the matter under investigation whether

Indictment. Mike Ruddy visited the home of the Benvenuto's or not. The indictment, which is too long to quote in full, after setting forth the facts showing the Local Option Law in force, the empaneling and organization of the grand jury, the oath administered to the defendant, and the nature of the investigation which was in progress, contains this statement:

"That after the said oath had been so duly administered and while the said Mike Ruddy was then and there before the said grand jury, duly sworn as aforesaid, it then and there became and was a material question whether the said Mike Ruddy had in truth and in fact entered the dwelling house in which the said Jim and Sadie Benvenuto live and have lived during the last twelve months in the City of Novinger in Adair County, Missouri, and outside the corporate limits of the said City of Kirksville."

At common law the general allegation that the question was material would have been insufficient; facts

to show the materiality of the evidence had to be alleged. [State v. Keel, 54 Mo. 182.] But the statute has simplified the form of indictment in such cases. Section 3132, Revised Statutes 1919, specifies what shall be required in an indictment for perjury; as to the materiality of the false statement it is required to state only:

“That the matter or testimony alleged to be false was material to a certain matter or issue named, without setting forth the particular facts showing this materiality.”

The statute settles that question against the contention of the appellant. [State v. Rhodes, 220 Mo. l. c. 13.]

II. It is further claimed that the “assignment of perjury” in the indictment is insufficient; that is, that the indictment does not sufficiently, explicitly and directly state the truth of the matter about which the alleged false testimony was given. The indictment
Indictment. contains the assignment of perjury in the following language (For convenience we arrange it in two paragraphs):

(a) “Whereas, the said grand jurors charge that in truth and in fact the said Mike Ruddy had been frequently in the said house in the City of Novinger, Adair County, Missouri, and outside the corporate limits of the City of Kirksville, in which the said Jim Benvenuto and Sadie Benvenuto have lived for the past twelve months;” and

(b) “the said Mike Ruddy at the time of giving said testimony well knew that on several occasions within the last twelve months he had gone into the said house in which the said Jim and Sadie Benvenuto were then and there so living in the said City of Novinger, Adair County, Missouri, and outside the corporate limits of the said City of Kirksville.”

It is urged by appellant that the first part of the statement (a) does not aver that Mike Ruddy had been in the house of the Benvenettos within twelve months; it alleges only that he had been in the house where they had lived for the last twelve months, without a specific

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allegation that he was there at the time they were living there; and the latter part, (b) alleges only that Ruddy *knew* he had been there within that time, which would not satisfy the requirement of the common-law rule that all averments must be made positively and directly and not inferentially.

As to the first part of the assignment (a):

The Statute of Jeofails in regard to criminal indictments, Section 3908, Revised Statutes 1919, provides that an indictment or information shall not be deemed invalid for certain omissions and irregularities, among others, "for want of an allegation of the time or place of any material fact, when the time and place have once been stated in the indictment or information."

The section concludes with this language: "Nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits; provided, that nothing herein shall be so construed as to render valid any indictment which does not fully inform the defendant of the offense of which he stands charged."

"Any other defect or imperfection" is held to mean those of character similar to the ones enumerated. The trouble with the assignment of perjury is that it fails to contain an allegation of "the time or place of a material fact," or has a "defect or imperfection," similar in character to such omission. It comes within the curative provisions of the Statute of Jeofails. Further, the condition that "time and place had once been stated" in the indictment, as required by the statute, is met. Such time and place had been stated once in the passage quoted (b). It is also stated in another place in the indictment, as follows:

"And that the said grand jurors had been informed and advised that the defendant Mike Ruddy within the last twelve months had been a frequent visitor at the said house, in the said City of Novinger, Adair County, Missouri, and outside the corporate limits of the said City of Kirksville wherein the said Jim Benvenuto and said

Sadie Benvenuto lived and where they lived during the last twelve months; and where the said Jim Benvenuto and Sadie Benvenuto, as the grand jurors believe, kept and sold intoxicating liquors within the last twelve months."

A reasonable conclusion from the provisions of the statute is that the omission directly to state Ruddy's visits were within the last twelve months is fully cured because the fact sufficiently appears, and the indictment did "fully inform the defendant of the offense of which he stands charged."

Further, the latter passage quoted (b) to the effect that Mike Ruddy at the time of making the false statement, "well knew that on several occasions within the last twelve months he had gone into said house," etc., is technically no part of the assignment of perjury, but a necessary allegation to show defendant's knowledge that his testimony was false.

Yet, the Court of Appeals of New York, in *People v. Clements*, 107 N. Y. 205, held that such an allegation was sufficient assignment of perjury, using this language at page 209:

"The objection now made to the indictment is that the indictment does not, in direct terms, aver that the statements contained in the report, and in respect to which perjury is assigned, were as a matter of fact, untrue, but only that the defendant well knew them to be untrue, and well knew them to be otherwise than as stated in the report. . . . But giving full effect to the proposition that it was necessary to negative the facts which the defendant swore to on information and belief, we think the indictment did in substance contain such a negative. It averred, in the first place, that the defendant had at the time full and certain knowledge as to the real and true condition of the bank in respect to the matters in question, and that he well knew that the facts were other than as stated in the report, and well knew that the statements in the report were false. It logically follows that these averments amount to an allegation that the statements

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were false. His knowledge as to the matters stated being full and certain, he could not know the statements to be false unless they were so."

The court then calls attention to the common-law rule that allegations should not be argumentative, but holds that "a pleading is deemed to allege what can only, by fair and reasonable intendment, be implied from the facts stated."

The same rule as to inferential assignment of perjury has been announced in other jurisdictions. [State v. Kelly, 113 Miss. 461, l. c. 472-3; Blakey v. Commonwealth, 209 S. W. (Ky.) 516; Gregorat v. United States, 249 Fed. 470; Hardwick v. United States, 257 Fed. 505, l. c. 508; See Moore v. State, 124 Am. St. 652, where the matter is treated at length in copious notes, pp. 671-675.]

In Vermont and Arkansas it is held that an inferential statement of the facts constituting the assignment of perjury is sufficient though presented in another form. In State v. Smith, 63 Vt. 201, the perjury charged was that the defendant swore he saw Fuller sign a certain paper; the assignment of perjury was that Fuller didn't sign the paper. A direct assignment of perjury would have made it necessary to aver that the defendant didn't see Fuller sign the paper. Of course on proof that Fuller did not in fact sign it the necessary inference followed that the defendant could not have seen him sign it. It was held the inferential assignment of perjury was sufficient. See also to same effect, Atkinson v. State, 202 S. W. (Ark.) 709; Lewis v. State, 78 Ark. 567; Smith v. State, 91 Ark. 200.

This court has never passed upon the question under consideration. It has consistently adhered to the rule that all averments in an indictment must state the facts constituting the offense directly, and not inferentially; but we find no ruling in this State and discover no reason why the inferential statement, as approved in the cases last cited, is not sufficient where the defendant is fully apprised of the charge he must meet and can suffer no injustice or inconvenience from the manner of stating it.

Here again the Statute of Joefails would work a cure, for it is an imperfect statement of "the time of a material fact" which elsewhere in the indictment has been stated. The assignment of perjury was sufficient.

III. Appellant further claims that even if the indictment sufficiently alleges the materiality of the evidence, as shown in Paragraph I of this opinion, the evidence is not sufficiently specific to show that it was material whether Ruddy visited the Benvenuto house or not. He argues that it would be necessary to show he visited the house when booze was being sold there.

Greenleaf in his work on Evidence (16 Ed.), vol. 3, sec. 195, says:

"115. *Materiality*. As to the materiality of the matter to which the prisoner testified, it must appear either to have been directly pertinent to the issue or point in question, or tending to increase or diminish the damages, or to induce the jury or judge to give readier credit to the substantial part of the evidence. But the degree of materiality is of no importance; for, if it tends to prove the matter in hand, it is enough, though it be but circumstantial."

This court several times has had before it for consideration the question of materiality of evidence claimed to be perjured. In an early case, *State v. Lavalley*, 9 Mo. 834, l. c. 837, this court said:

"False oaths taken and which are material upon any and every collateral issue in the progress of a cause, are equally punishable as if taken upon the trial of the main issue. As in the case in *I Hawk. P. C. 320*, where it is said that 'any false oath is punishable as perjury which tends to mislead the court in any of their proceedings relative to a matter judicially before them, though it in no way affect the principal judgment.' "

Likewise in the case of *State v. Wakefield*, 73 Mo. 549, l. c. 554, this court said:

"Whether all the links in the chain of circumstantial evidence necessary to its completion are supplied or not,

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a witness who has sworn falsely in regard to any link is as guilty as if the evidence fully supplied that and any other parts. *A criminal charge is proved step by step.*" (Italics ours.)

This passage is quoted in a later case, *State v. Jennings*, 278 Mo. 1. c. 552.

This court also said in *State v. Moran*, 216 Mo. 1. c. 561:

"It does not follow, because the matter testified to is not specially concerning the acts of the defendant in the commission of the offense, that such matter might not be made a subject upon which a charge of perjury might be predicated, if such matter is material."

Where the testimony alleged to be false is material to any proper matter of inquiry in the case and is uttered by the witnesses with knowledge of its falsity, it is perjury, though it may not tend directly to prove the issue. [*State v. Hardiman*, 277 Mo. 1. c. 233.]

If it were necessary that the witnesses should have seen the Benvenettos actually selling liquor in their home, then the case would be entirely made out by his testimony alone. A case sometimes must be built up "step by step." It was one of the steps in making out a case to show that the witness visited the place where liquor was being sold. It was another step to show that he saw it being sold. Of course, if he denied being at the place it was useless to ask him what he saw there. Whether or not he was there was material to the matter under investigation. In the case of *Smith v. State*, 91 Ark. 200, the facts are very similar to the facts in this case.

The defendant was fully apprised of the charge which he must be prepared to meet; he had a fair trial upon the merits of his case and was convicted upon sufficient evidence to sustain a verdict. The judgment is affirmed. *Railey and Mozley, CC., concur.*

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur, except *Higbee, P. J., not sitting.*

WILLIAM JONES, An Infant, By FRANK J. JONES,
His Next Friend, v. ST. LOUIS-SAN FRANCISCO
RAILWAY COMPANY, Appellant.

Division Two, March 19, 1921.

1. **INSTRUCTION: Credibility of Witness: Statements Contradictory of Testimony: Comment.** It is not error to refuse an instruction telling the jury that if they find and believe that plaintiff has made statements out of court "contrary to and at variance with his testimony" they "may take this fact into consideration in determining what weight and credibility" they will give to the plaintiff's testimony. Such an instruction is a comment on plaintiff's evidence, and should not be given. The general instruction respecting the credibility of witnesses is sufficient.
2. **EXCESSIVE VERDICT: Passion and Prejudice: Reversal.** Where plaintiff's evidence upon the merits of the controversy is substantial and no error was committed against defendant during the progress of the trial, a verdict for a reasonable amount will be upheld on appeal. But if the verdict, in the light of all the facts, appears to have resulted either from passion or prejudice on the part of the jury, the judgment will be reversed, and the cause remanded for a new trial.
3. ———: ———: ———: **Contradictory Testimony.** Where plaintiff was a trespasser upon defendant's moving freight train, and testified that as he attempted to climb up the iron ladder of a car a brakeman on the top of the car struck him with an axe-handle, knocked him off, he fell on sandy ground which sloped towards the track, he rolled towards the track and the car wheels cut off his foot, and five witnesses testified that he told them on the day of the accident that he got on a car which was two or three cars ahead of the car which one of his companions had boarded, that he wanted to get off and get back to the car where such companion was, and that, in doing so, he fell off of the car and got his foot cut off, and these witnesses were either guilty of wilful perjury in so testifying, or plaintiff was guilty of perjury in denying that he made such statements to them; and where the conductor of the train and a brakeman testified that both brakemen were in the caboose at the time of the accident, and no brakeman was on the top of any car; and where the evidence is overwhelmingly against plaintiff as to the manner in which he

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claims to have been injured, and the jury, nevertheless, ignored it and returned a verdict for \$15,000, which was \$2500 more than the trial court ruled was reasonable compensation, and which the Supreme Court considers was excessive, at least to the extent of \$5,000, if no error had been committed during the progress of the trial, it will be ruled that the verdict was the result of passion or prejudice on the part of the jury, and that justice requires that the judgment be reversed, and the cause remanded for a new trial.

4. **INSTRUCTION: Affidavit for Continuance.** Where defendant filed its application for a continuance, based on the absence of a witness, and set up therein the facts such witness would testify if he were present, which were substantial and material to the issues, and plaintiff agreed that if such witness were present he would testify to those facts, the defendant is entitled to an instruction telling the jury that the evidence of such absent witness, as contained in said affidavit and read to them, is entitled to and should be given the same weight and credit they would give it if said witness were personally present and testified to the same facts.
5. **BRAKEMEN: Authority to Eject Trespassers.** In this case there was sufficient evidence to enable the jury to determine whether or not the brakemen on defendant's moving freight train were authorized, while acting in the line of their duty, to eject trespassers from the train.
6. **INSTRUCTIONS: Measure of Damages: Misleading.** If defendant is fearful that a given instruction on the measure of damages, of itself unobjectionable, may in some way mislead the jury, it is defendant's duty to ask for an instruction declaratory of the law from its viewpoint.

Appeal from St. Louis City Circuit Court.—*Hon. Frank Landwehr, Judge.*

REVERSED AND REMANDED.

W. F. Evans, E. T. Miller and A. P. Stewart for appellant.

(1) The demurrer to the evidence should have been sustained, and the peremptory instruction requested at the close of the whole case should have been given. (a)

Plaintiff's evidence as to the manner in which he received his injuries is beyond belief and does not comport with either physical facts or laws. (b) The testimony of plaintiff's witnesses, Warmack and Cooper, that it was the duty of brakemen on defendant's freight trains to expel trespassers therefrom was based on their conclusions, and hence was incompetent and cannot support the verdict. *Kane v. Railway*, 251 Mo. 44; *Davidson v. Railway*, 207 S. W. 277. The remaining evidence was not sufficient to show that the duties of defendant's brakemen included the ejection of trespassers from freight trains. This will not be presumed, but the authority of a brakeman in that behalf must be established *aliunde* the mere fact that he is a brakeman. *Farber v. Railway*, 116 Mo. 93; *Krueger v. Railway*, 84 Mo. App. 366; *Marcum v. Railway*, 139 Mo. App. 220. (c) Even if plaintiff's evidence could be said to be sufficient to raise a presumption that it was the duty of brakemen on defendant's freight trains to expel trespassers, and thus make out a prima-facie case, yet this presumption was overcome by positive evidence to the contrary, and since plaintiff then produced no positive testimony to disprove defendant's positive testimony, his prima-facie case falls. *Guthrie v. Holmes*, 217 Mo. 233. (2) Plaintiff's instruction on the measure of damages is erroneous. This instruction did not confine the jury to a consideration of the evidence in assessing the damages, but was a roving commission to the jury to assess the damages at such sum as, in their opinion, would fairly compensate plaintiff, without any regard whatever to the evidence. This error was not cured by any instruction given at the request of defendant. *Ganz v. Railway*, 220 S. W. (Mo.) 497. (3) The court erred in refusing to give defendant's requested instruction "C." Under the statute the facts set forth in an affidavit for a continuance shall, if the opposite party admits that the absent witness would, if present, swear to such facts, be read as the evidence of such witness. To give the moving party the benefit of such evidence which the statute bestows, the court should instruct the jury that such evidence is en-

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titled to the same weight and credit they would give it if the witness were personally present and testified to the same facts before them. Sec. 1960, R. S. 1909. (4) The verdict was grossly excessive, and clearly the result of prejudice and passion on the part of the jury, and notwithstanding the *remittitur* forced by the court *nisi*, the judgment is still excessive. *Chitty v. Transit Co.*, 166 Mo. 443; *Stolze v. Transit Co.*, 188 Mo. 590; *Nicholds v. Glass Co.*, 126 Mo. 68; *O'Connell v. Railway*, 106 Mo. 485; *Brady v. Railroad*, 206 Mo. 540; *Johnson v. Coal Co.*, 205 S. W. 619; *Newcomb v. Railroad*, 182 Mo. 726; *Les-senden v. Railroad*, 238 Mo. 265; *Greenwell v. Railway*, 222 S. W. 410.

Earl M. Pirkey and Arthur Stahl for respondent.

(1) Appellant cannot complain of alleged error in respondent's instruction where he gives or requests an instruction containing the same thing. *Smart v. Kansas City*, 208 Mo. 204; *Williams v. Elec. Co.*, 274 Mo. 14. (2) Testimony that brakemen customarily put off persons who were not entitled to be transported on freight trains, and this was done over a long period of time, will establish the brakeman's authority to eject persons who have no right to ride. *Markham v. Railroad*, 139 Mo. App. 220. (3) To show the authority of a brakeman to eject trespassers it is competent for a brakeman or conductor to testify what the duties of a brakeman are. *Farber v. Mo. Pac. Ry. Co.*, 139 Mo. 279. (4) Defendant is liable for the acts of its brakeman if what he did was within the scope of the brakeman's employment. *Droelshagen v. Railroad*, 186 Mo. 266. (5) It is also said that defendant is liable for the acts of its employee "when done in the course of his employment." *Farber v. Mo. Pac. Ry. Co.*, 116 Mo. 92; *Gardner v. St. Louis Screw Co.*, 201 Mo. App. 358; *Whiteaker v. Railroad*, 252 Mo. 458. (6) The omission from an instruction of the cautionary requirement to find from the evidence or weight of the evidence is not reversible error. *Ullrich v. Ry. Co.*, 220 S. W. 686; *Zack-*

wick v. Fire Ins. Co., 225 S. W. 139; Cody v. Gremmer, 121 Mo. App. 359; Compressed Air Co. v. Fulton, 166 Mo. App. 28; Logan v. Field, 192 Mo. 69; Strode v. Conkey, 106 Mo. App. 15; Rogers & Powers v. Warren, 75 Mo. App. 275; Baker v. Ry. Co., 52 Mo. App. 606. (7) It is improper to single out a witness and comment on a part of his evidence; for this reason the court properly refused appellant's instruction B. Landrum v. Railway, 132 Mo. App. 721; Huff v. Ry. Co., 213 Mo. 514; Quinn v. Railway, 218 Mo. 555; Zander v. Transit Co., 206 Mo. 461.

RAILEY, C.—This action was commenced in the Circuit Court of the City of St. Louis, on August 20, 1917. The case was tried on the second amended petition, which states in substance, that plaintiff was a minor between twelve and fifteen years of age; that Frank J. Jones was appointed his next friend, qualified as such, and prosecutes this action in that behalf; that defendant is a railroad corporation and, in July, 1917, operated a line of railroad from Starland, in Perry County, Missouri, to St. Louis, in said State; that on or about July 17, 1917, at or near Crystal City, Missouri, plaintiff boarded one of defendant's freight trains on said road, bound for St. Louis; that while on said train, and while it was in rapid motion, one of defendant's servants in charge of said train did willfully, intently, wrongfully and maliciously threaten to strike plaintiff, and did strike him, whereby he was caused to fall from said train while it was in rapid motion, and one or more wheels of said train ran over, crushed, lacerated, tore and bruised plaintiff's left foot, so that the front half thereof had to be, and was amputated; that plaintiff's head, limbs and body were bruised; that his back was lacerated, torn and bruised, and plaintiff sustained a great nervous shock. "That said acts of said servant in charge of said freight train were within the scope of his employment and authority under defendant, and were done while he was undertaking to serve defendant pursuant to his said employment and while he was in

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the course of his employment under defendant; that by his injuries so sustained, plaintiff has suffered," etc. The petition concludes with a prayer for \$20,000 actual damages and \$10,000 punitive damages.

The answer is a general denial.

It appears from the evidence that plaintiff, who was about fourteen years of age, and two companions, Edward and William Hawver, about fifteen and thirteen years of age respectively, on July 17, 1917, were in Crystal City aforesaid, and were desirous of returning to St. Louis, Missouri, where they lived; that about 300 or 400 feet north of defendant's depot at Crystal City, a bridge was in course of erection over defendant's track; that about one o'clock on that day a north-bound freight train passed through Crystal City on its way to St. Louis; that plaintiff and the older Hawver boy, Edward, according to their testimony, got on this train from the west side, while it was in motion; that the younger Hawver boy did not get on the train, but ran along the side of same. Plaintiff testified, in substance, that he and his two companions were standing beside the track about fifteen feet north of the bridge when the train came along; that the train was running about fifteen or twenty miles an hour; that Edward Hawver got on the side of a car, near the engine, and plaintiff got on two cars behind him; that the smaller boy did not get on, but ran along by the side of the train; that plaintiff climbed on a box car by the iron hand-holds until he got within about two feet of the top of same; that he climbed about four or five of those steps before he was hurt. He testified "that the brakeman was on top of the car with a stick and he said, 'what are you doing there?' and he hit me with the stick, and I fell off;" that this man struck him on the left shoulder; that he did not know what the man hit him with, but it was about two feet long and looked like an axe handle; that he hit plaintiff hard, and knocked him off the train; that plaintiff fell on his back on the sand; that the latter slanted to the track; that plaintiff slipped under the train and his left foot was cut off; that the brakeman of that train struck him.

He further testified on cross-examination: "Q. How did you know that man was a brakeman on that train? A. I have saw them before."

He said the brakeman just hit him once; that he had ridden about 100 feet from where he got on the train.

Plaintiff was then taken to the office of Dr. Commerford, where his injuries were dressed.

Edward Hawver testified by deposition that "the three of us got on; we boarded the train. I was on a coal car near the middle of the train and the two other boys got on two cars back of me. I saw a brakeman on the train, and he told the boy to get off; hollered and told him to get off. The train was in motion when this was done; the freight train was running about fifteen or twenty miles an hour. I first knew that an accident had occurred when my brother hollered for me."

On cross-examination, he testified, in substance, that he did not see his brother get on the train; that the latter had gone about two or three city blocks from the bridge when plaintiff got off, and the train was going fifteen or twenty miles an hour when he got off; that the brakeman whom he saw was on top of the box-car where plaintiff was; that plaintiff was on the back end of the ^h that the brakeman told plaintiff to get off, but did not say anything to witness; that as soon as the brakeman said get off, plaintiff hopped off and fell; that his brother was running along the side of the train behind witness; that he was running at the side of the car Jones was on, all the time.

William Hawver testified, in substance that his brother first boarded a car, and plaintiff got on a car two cars further back; that, "I saw a brakeman holler at the Jones boy and scared him and he sort of ran backwards and fell, and cut his foot off, and I hollered up to my brother to get off the train;" that the train was going fifteen or twenty miles per hour; that plaintiff got on two cars further back than his brother; that as witness was going along the side of the freight train, he saw a brakeman hollering at Jones and trying to scare him; that he

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made Jones unbalance himself, and he fell backwards; that his foot went right underneath the car, and his foot was cut off up to the center of his arch; that he saw the brakeman on top of the box car; that he had a club in his hand, and it looked like an axe handle; that he picked it up and started to hit plaintiff; that he hollered at plaintiff, the latter overbalanced himself and went off; that witness did not get on the train.

On cross-examination witness testified, that the brakeman was on top the car about the middle and kneeling down; that when the brakeman hollered, witness saw him raise a club; that he heard the brakeman tell plaintiff to get down off the car or he would hit him with the club. Witness further testified: "And with that freight train running fifteen or twenty miles an hour I was keeping up with that car, and above all the noise that train was making I could hear what the brakeman said to William Jones."

This witness further testified:

"Q. You say this brakeman had a club in his hand?

A. Yes, sir.

"Q. He didn't hit William Jones, did he? A. Yes, sir—he made a break to.

"Q. What did he do? A. He held the club up and started to strike him.

"Q. Well, did he strike him? A. Yes, sir.

"Q. How long was that club? A. Two foot.

"Q. About two feet? A. Yes, sir.

"Q. How far was the brakeman from William Jones? A. You mean by feet?

"Q. Yes. A. About thirteen foot.

"Q. About thirteen feet from him. The brakeman was up on top of the box car? A. Yes, sir.

"Q. And William Jones was down on the side of the coal car? A. Yes, sir.

"Q. Did you see William Jones get off? A. He didn't get off; he fell off.

"Q. He fell off? A. Yes, sir.

"Q. Did you see him fall? A. Yes, sir.

"Q. Where were you when he fell? A. Down by the side of the box car.

"Q. By the side of the same box car you had been running along by? A. Yes, sir.

"Q. How fast was that train going when he fell off? A. Kept the same rate of speed."

John Warmack, a witness for plaintiff, testified that he worked about nine years for defendant on the line of road running from Starland to St. Louis; that he started as a brakeman, and got to be a conductor; that on through freights, defendant had two brakemen, and three brakemen on local freight trains; that he knew what the duties of a brakeman were during the above period, on freight trains running over said road. The following questions were then propounded to said witness:

"Q. What were the duties, during those times, in regard to persons; take first the case of persons, including trespassers, who are not members of the train crew and who are not passengers, and who get on the freight cars—what were the duties of a brakeman in that event?

"MR. STEWART: I desire to object to that, because it is incompetent, irrelevant and immaterial and calls for the conclusion of the witness."

This objection was overruled and an exception saved. Witness then answered, that the duties of the brakemen were to keep trespassers off the train, and to put them off if they got on.

On cross-examination this witness testified that he had been discharged from service, on account of a rear-end collision; that he sought re-employment and defendant refused to re-instate him; that the conductor is in charge of the train.

E. D. Cooper was sworn as a witness for plaintiff, and testified, in substance, that he was a brakeman on defendant's road in Oklahoma, and had passed over the line from St. Louis to Starland on passenger trains a few times. Witness was then asked to state what the duties of a brakeman were, in respect to ejecting persons from the trains who had no right to ride thereon. This was objected to

for the same reason heretofore assigned as to the testimony of Warmack on the same subject. The objection was overruled and an exception duly saved. He also testified that he had put persons off the train while he was brakeman.

Dr. Guy Simpson and plaintiff testified in respect to the latter's injuries.

The foregoing covered substantially all of plaintiff's evidence in chief. At the conclusion of same, defendant interposed a demurrer to plaintiff's evidence, which was overruled and an exception saved.

Defendant's evidence tends to show that plaintiff was taken to Crystal City to the office of Dr. James Commerford for emergency treatment. Dr. Commerford was surgeon for the Pittsburg Plate Glass Company at the above point. The above doctor testified that he dressed plaintiff's injuries on the afternoon he was hurt; that the plaintiff was conscious and talked to him about the manner in which he received said injuries. Dr. Commerford testified, in respect to this subject, as follows:

"Q. What did he tell you about the manner in which he sustained his injuries? A. Told me that he and the other boys boarded a freight train to ride to St. Louis; that he had gotten on about two cars ahead of the other boys and, wanting to get back to them, he hopped off and fell under the car.

"Q. Did he tell you that in response to your question as to the manner in which he sustained his injuries? A. Yes, sir.

"Q. Did he say anything in that conversation about the brakeman hitting him with a club and knocking him from the train? A. No, sir."

Witness said he heard plaintiff tell Mr. Hughes, the station agent of defendant, the same afternoon, just what plaintiff had told witness as to how he was injured. He testified that he was present when defendant's exhibit 1 was written by Mr. Hughes; that the latter wrote it as plaintiff dictated it; that at the time it was written, plaintiff was conscious and his mental condition perfectly clear.

On cross-examination, witness testified that plaintiff complained very little of his injury, but was worried as to what his father was going to do to him when he got him home. Witness said he did not allow the plaintiff's companions to come into the room while he was dressing plaintiff's foot.

Geo. C. Taylor, superintendent of the Pittsburg Plate Glass Company, at Crystal City, saw plaintiff while he was being carried to Dr. Commerford's for emergency treatment. He testified, in substance, that plaintiff was conscious and told him how he received his injuries; that plaintiff told him "he got on a car ahead of the other boys and he jumped off, to get on the same car they were on, and struck a pile of sand and went under the car and got hurt. The plaintiff did not say anything in that conversation about a brakeman being on that train." Witness was shown, and identified, defendant's exhibit 1, which he signed as a witness. He said, when Hughes wrote exhibit 1, he read it over to plaintiff, and the latter signed it.

A. H. Hughes, station agent of defendant at Crystal City, testified that he talked with plaintiff the same day of accident while he was at Dr. Commerford's office. He told Hughes that he was trying to board a north-bound freight train with his two companions; that he had gotten on a coal car, two car-lengths ahead of where one of his companions got on, and that he wanted to get off and get back where the other boy was and, in doing so, he fell off the car and got his foot cut off; that he wrote exhibit 1, as plaintiff gave him the facts; that he read it over to plaintiff and the latter signed it.

T. M. Roseman, foreman of defendant's bridge crew, who were constructing the bridge mentioned by plaintiff, testified, that he saw the freight train pass the bridge, but did not see any of the train men on the freight train as it passed over the bridge; that he was present when Mr. Hughes wrote defendant's exhibit 1; that plaintiff told Hughes that he and the two Hawver boys were trying to beat their way to St. Louis, and the other two boys had

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gotten on a car two or three cars back of the car he was on, and he jumped off to get on the same car, and when he did that, his foot went under the wheel.

T. P. Williams, witness for defendant, and who was working with Forman Roseman, testified that he saw plaintiff after he was hurt, near the bridge; that plaintiff then said to him: " 'I fell down and the train ran over me. I was walking along the side of the train and I fell down and it ran over me.' He told me he was walking along the side of the train and it knocked him down and got his foot under the train."

Defendant's exhibit 1, reads as follows:

"Crystal City, Mo., 7/17, 1917.

"My name is William Jones and my home is at 4561 Moffitt Ave., St. Louis, Mo. I am 13 years old and was in Crystal City, Mo., on July 17th. I with some friends wanted to go back to St. Louis and waited until some freight train was going to St. Louis. I jumped on side of car of Ex 1233 and after getting on car I decided to get off this car and get on another one. On jumping off the car I was on I jumped in sand pile and slid down under the train getting my foot injured. I knew that it was a violation of the Railway Co. rules to jump on freight trains and took all responsibility on myself when doing it.

"WM. JONES.

"Witness G. C. TAYLOR."

The conductor of said train, J. R. Johnson, testified that his train crew on the day of accident consisted of brakemen C. C. Holt and C. O. Roach, the engineer, fireman, and himself as conductor; that both of the above brakemen, were in the caboose with him when the train passed said bridge; that none of his crew were on top of the train as it passed the above bridge; that the conductor of a freight train is in charge of same and the brakemen work under his orders.

C. C. Holt, one of the brakemen on the freight train which injured plaintiff, testified, that he and the other brakeman, Roach, were in the caboose with the conductor

and that none of the crew were on top of said train as it passed the bridge; that he did not order plaintiff to get off the train and did not see any one get hurt; that the conductor is in charge of the train; that he never saw a brakeman put a man off the train.

Clare Roach, the other brakeman on the train which injured plaintiff, was absent from the jurisdiction of the court. Defendant applied for a continuance, and set out what is expected to prove by Clare Roach. To obviate a continuance, plaintiff's counsel admitted that said witness, if present, would testify to the facts stated in said application for continuance. His evidence was accordingly read to the jury from said application for a continuance, as the testimony of said witness. The testimony of Roach corroborates that of the conductor and brakeman Holt; and shows that he was not on the top of the train; nor were any others of the train crew on top of the train, when it passed the bridge; that he did not see plaintiff on the train; that he did not strike plaintiff or order him to leave the train, nor did he threaten to strike plaintiff, etc.

Plaintiff testified in rebuttal that he did not tell T. P. Williams, or any one else, that he walked along the side of train, or that it struck him or knocked him down and he fell under the wheels; that he did not tell Dr. Commerford or Mr. Taylor, or any one else, that he got on the train ahead of the other boys; that he did not tell them or any one else that he jumped off the train in order to get back where his companions were; that he did not tell them he lit on a sand pile and got under the train and sustained his injuries in that way; that he just guessed the train was running fifteen or twenty miles per hour. He further testified that, at the time the doctor dressed his wounds, his foot was paining him so badly that they could hardly keep him there; that he was screaming all the time, "until this hypodermic was injected." He further said that Hughes did not explain anything when the statement was taken and that he was forced to sign it.

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Such other facts as may be deemed important, as well as the instructions and rulings of the court, will be considered later.

The jury returned a verdict for plaintiff, as follows:

"We, the jury in the above cause, find in favor of the plaintiff, on the issues herein joined, and assess plaintiff's damages at the sum of fifteen thousand dollars."

On April 10, 1919, the trial court entered judgment on the verdict aforesaid for the full amount. Defendant, in due time, filed its motion for a new trial.

On July 14, 1919, the court required plaintiff to remit, on or before July 28, 1919, \$2,500 of said judgment; otherwise, a new trial would be granted. On said July 14th, counsel for plaintiff remitted \$2,500 from the verdict and judgment aforesaid. Thereupon a new judgment for \$12,500 was entered and defendant's motion for a new trial overruled.

The case was duly appealed by defendant to this court.

I. It is insisted by appellant, under its "Points and Authorities," that a demurrer to the evidence at the conclusion of the whole case should have been sustained. In order to pass upon this question intelligently, **Demurrer to Evidence.** the evidence has heretofore been set out very fully. Without entering into an extended discussion of this subject, we do not feel justified in holding, as a matter of law, that plaintiff is not entitled to recover.

II. Defendant assigns as error, the action of the trial court in refusing its Instruction B, which reads as follows:

"The jury are instructed that if you believe and find from the evidence, that the plaintiff has made statements out of court respecting the manner in which his alleged **Statements Out of Court.** injuries were caused, contrary to, and at variance with, his testimony as given on the witness stand, you may take this fact into consideration in determining what weight and credibility you will give to the testimony of the plaintiff."

This class of instructions was approved in some of the earlier cases in this court, like that of Feary v. Ry. Co., 162 Mo. 78, but we subsequently overruled the Feary case, and others of a like import, upon the theory that instructions like the one in controversy are, in legal effect, a comment upon the plaintiff's evidence and should not be given. The general instruction given by the court, in respect to the credibility of witnesses, was sufficient to cover this question. [Montgomery v. Railroad, 181 Mo. 477; Conner v. Railroad, 181 Mo. 398; Zander v. Transit Co., 206 Mo. 445, 103 S. W. 1006; Stetzler v. Met. Street Ry. Co., 210 Mo. 1. c. 713; Huff v. Ry. Co. & St. Joseph, 213 Mo. 495; Quinn v. Met. Street Ry. Co., 218 Mo. 1. c. 556; Norris v. Railroad, 239 Mo. 1. c. 719; Steele v. Railroad, 265 Mo. 97; State v. Finkelstein, 269 Mo. 612; State v. Goode, 271 Mo. 1. c. 49; State v. Gulley, 272 Mo. 484; State v. Woods, 274 Mo. 1. c. 617-8; State v. Kocian, 208 S. W. 1. c. 46.]

The foregoing authorities, as well as many others which might be cited, settle the law in this State, in respect to above matter, adversely to appellant's contention.

III. It is insisted by appellant that the verdict of the jury in this case for \$15,000 was not only grossly excessive, but was the result of passion and prejudice against defendant, or sympathy for plaintiff. It may be conceded, as a general proposition, that where plaintiff produces substantial evidence before the jury as to the merits of his controversy, and no error has been committed during the progress of the trial against appellant, the verdict returned under such circumstances for a reasonable amount will be upheld by this court. If, on the other hand, the verdict returned, in the light of all the facts before us, appears to have resulted from either partiality or prejudice upon the part of the jury, this court, in the exercise of its inherent jurisdiction, will not hesitate to reverse and remand the cause for a new trial.

Passion
and
Prejudice.

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On turning to the record, we find that plaintiff was a lawbreaker and trespasser upon defendant's train at the time and place of accident. He was not there by either the express or implied invitation of defendant.

Doctor James Commerford, George C. Taylor, A. H. Hughes, T. M. Roseman and T. P. Williams, whose testimony is heretofore set out, were guilty of deliberate, willful perjury, in testifying that plaintiff told them on the day of the accident he got on the train ahead of his companions, dropped off to get back with them, and was injured by the train in passing along same, *or* the plaintiff was guilty of willful, audacious perjury, in denying that he made any such statements to either of said parties. There can be no middle ground in respect to this matter. Again, J. R. Johnson, the conductor of said train, and C. C. Holt, a brakeman thereon, were guilty of perjury in testifying that the conductor and both brakemen were in the caboose and that neither of them was on top of the train when it passed the bridge and injured plaintiff, *or* respondent was guilty of perjury, when he testified that defendant's brakeman was on top of one of the cars in said train, and struck him with a club, while the train was going fifteen to twenty miles per hour, and knocked him off.

In our opinion, the evidence was overwhelmingly against plaintiff as to the manner in which he claims to have been injured, yet, the jury seem to have ignored the clear and positive testimony of defendant as to the merits of the controversy, and returned a verdict in favor of plaintiff for \$2,500 more than the trial court declared was reasonable compensation, and which we consider, would have been excessive, to the extent of at least \$5,000, if no errors were committed during the progress of the trial. In view of all the facts and circumstances in this case, we are of the opinion that the ends of justice require that the cause should be reversed and remanded for a new trial. [Goetz v. Ambs, 22 Mo. 172-3; Price v. Evans, 49 Mo. 396-7; Whitsett v. Ransom, 79 Mo. 258; Spohn v. Ry. Co., 87 Mo. 1. c. 84-5;

Garrett v. Greenwell, 92 Mo. l. c. 125; State v. Primm, 98 Mo. l. c. 372-3; Adams v. Ry. Co., 100 Mo. l. c. 569-70; State v. Prendible, 165 Mo. l. c. 353; Weltmer v. Bishop, 171 Mo. l. c. 116-7; Gibney v. Transit Co., 204 Mo. l. c. 723; Partello v. Railroad, 217 Mo. l. c. 661; Harper v. Railroad, 186 Mo. App. 296, 172 S. W. 55; Spiro v. Transit Co., 102 Mo. App. l. c. 263-4-5.]

We deem it unnecessary to quote from the foregoing authorities, but it may be said in passing that they fully sustain the conclusions heretofore announced.

IV. Appellant assigns as error the action of the trial court in refusing to give to the jury its instruction marked "C," which reads as follows:

"The court instructs the jury that the evidence of the absent witness, Clare Roach, as contained in and read to you from the affidavit in support of defendant's application for a continuance, is entitled to and should be given the same weight and credit that you would give it if said witness were personally present and testified to the same facts before you." [Sec. 1960, R. S. 1909; Elsner v. Sup. L. K. & L. of Honor, 98 Mo. 640.]

Section 1960 supra, in referring to applications for a continuance, among other things, provides, that if "the court shall find the affidavit sufficient, the cause shall be continued, unless the opposite party will admit that the witness, if present, would swear to the facts set out in said affidavit, *in which event the cause shall not be continued, but the party moving therefor shall read as the evidence of such witness the facts so stated in such affidavit*, and the opposite party may disprove the facts disclosed, or prove any contradictory statements made by such absent witness in relation to the matter in issue and on trial."

We confess our inability to understand upon what theory of law the trial court refused to give said instruction "C." It is clearly within the purview of the above section of the statute, and in Elsner v. Sup. L. K. & L. of Honor, 98 Mo. 640, was held to properly state the law.

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This was an important matter from defendant's viewpoint, as the conductor, Johnson, and Holt, the brakeman were present at the trial, and testified in person. Roach was not present, nor was his deposition taken in the case. The defendant was entitled to have the jury informed, under Section 1960 supra, that the testimony of Roach, as read, was to be considered as though he were present and testified to the facts stated in the affidavit. The refusal of said instruction cut off the legal right of defendant's counsel to argue before the jury the view they should take of Roach's testimony. Instruction "C" properly declared the law, and should have been given. The refusal of the court to give same, constituted reversible error.

V. There was sufficient evidence before the jury to enable the latter to determine whether or not the brakemen on defendant's train at the time and place of **Authority** accident were authorized, while acting in the **of Brakeman** line of their duty, to eject trespassers from appellant's freight trains. [Farver v. Ry. Co., 139 Mo. l. c. 281, 286; Whiteaker v. Railroad, 252 Mo. l. c. 458-9; Gordner v. St. Louis Screw Co., 201 Mo. App. 349; Marcum v. Railroad, 139 Mo. App. 217; Curtis v. Ry. Co., 99 Mo. App. 502.]

VI. It is insisted by appellant, that plaintiff's instruction numbered one is erroneous. It is not inconsistent with instruction five given at the instance of defendant. The two instructions taken together **Duties of Brakemen:** fairly presented the law to the jury, in respect **Instructions.** to the duties of brakeman on defendant's train under such circumstances as were detailed in evidence.

VII. Respondent's instruction numbered 7, on the measure of damages, is assailed by appellant as not properly declaring the law. Upon a careful consideration of same, we are of the opinion that said instruction **Measure of Damages.** is not obnoxious to the criticism leveled against it by counsel for defendant. If counsel were fearful that the jury might in some way be mis-

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led by said instruction as given, they should have submitted to the court an instruction of their own declaratory of the law from their own viewpoint. Having failed to do so, they are in no position to complain of the one given. [Morton v. S. T. & T. Co., 217 S. W. 1. c. 836; Powell v. Railroad, 255 Mo. 1. c. 456; Minter v. Bradstreet Co., 174 Mo. 1. c. 491; Browning v. Ry Co., 124 Mo. 1. c. 71-2.]

VIII. Some other questions have been argued in the respective briefs of counsel, but as they may not appear upon a retrial of the cause, we have not deemed it necessary to consider same.

On account of the errors heretofore pointed out, the cause is reversed and remanded for a new trial. *Mosley* and *White, CC.*, concur.

PER CURIAM:—The foregoing opinion of RAYLEY, C., is hereby adopted as the opinion of the court. All of the judges concur.

THE STATE v. JOHN I. DOUGHERTY, Appellant.

Division Two, March 19, 1921.

1. **EVIDENCE: Dying Declaration: Antecedent Statement: Brought Out by Defendant.** A defendant cannot complain of a statement made by deceased just prior to his dying declaration, if it was brought out by the suggestion of his counsel.
2. ———: ———: ———: **Competency: Res Gestae.** A statement made by deceased immediately preceding his dying declaration, that "it was a shame to shoot a man this way," made at the time of the shooting and necessarily forming a part of the facts and circumstances attending the crime, and so indissolubly connected with the act itself as to form a part of the *res gestae*, is properly admitted in evidence.
3. **INSTRUCTIONS: General Objection.** A general objection to instructions in a criminal case will not save them for review

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on appeal. The instructions complained of should be so designated, either literally, numerically or by reference to their subject-matter, as to enable the trial and appellate courts to determine what instructions are referred to.

4. —: **Converse of Those Given.** If the instruction given states the facts necessary to be found to establish the crime, and cannot reasonably be construed otherwise than as telling the jury that if they find the facts stated they may convict, but unless they so find they will acquit, it is not error to fail to give a converse instruction based on defendant's testimony. The words at the end of the instruction given for the State "unless the jury find the facts to be as stated they will acquit defendant" of themselves constitute a converse instruction, and it is only when such words are omitted from the one given that it is necessary to supplement it by a converse one.

Appeal from St. Louis City Circuit Court.—*Hon. Benjamin J. Klene*, Judge.

AFFIRMED.

Thomas B. Harvey for appellant.

(1) The court erred in admitting as a part of the dying declaration the statements by the deceased denunciatory of the shooting of him, to the effect that "it was a shame to shoot a man that way," etc. Only statements of what occurred were competent. *State v. Brown*, 188 Mo. 451; *State v. Kelleher*, 201 Mo. 614; 16 C. J. p. 843, sec. 2314 (3). (2) The instruction given upon the theory of the killing being done in the execution of a conspiracy was faulty in not putting to the jury the converse, based upon the defendant's testimony that he never joined any conspiracy. *State v. Fredericks*, 136 Mo. 58; *State v. Jackson*, 126 Mo. 521; *State v. Rutherford*, 152 Mo. 125; *State v. Levitt*, 213 S. W. (Mo.) 108. (3) The court erred in its instruction on conspiracy in declaring that the defendant's repentance and withdrawal from the contemplated crime must have been with the knowledge of his confederates to avail him anything. *Wharton on Homicide*, 665; *Richard*

v. State, 30 Ga. 757; State v. Allen, 47 Conn. 139. (4) Instruction 5, discrediting things favorable to himself, and lending legal approval to things against himself, in a statement introduced in evidence by the State, is erroneous as a comment on the evidence and pointing solely to the defendant as a witness. State v. Barrington, 198 Mo. 125; Stetzler v. Street Ry. Co., 210 Mo. 704; Lander v. Transit Co., 206 Mo. 461; Clay v. State, 15 Wyo. 64; Welsh v. State, 164 S. W. 119. (5) The instruction 4a, given by the court, was palpably erroneous and prejudicial in pointing out certain facts and commenting on the same. State v. Rafferty, 252 Mo. 72; State v. Wertz, 191 Mo. 569; State v. Pate, 188 S. W. 139; State v. Rutherford, 152 Mo. 130; State v. Sinclair, 250 Mo. 278; State v. Malloch, 269 Mo. 235; State v. Rogers, 253 Mo. 399; State v. Sivils, 105 Mo. 533.

Frank W. McAllister, Attorney-General, and *H. P. Ragland*, Assistant Attorney-General, for respondent.

(1) The statements made by deceased to Dr. Schloststein, were admissible. (a) They were admissible as dying declarations. State v. Brown, 188 Mo. 460; State v. Elkins, 101 Mo. 344; State v. Kelleher, 201 Mo. 637; State v. Evans, 124 Mo. 397; State v. Dipley, 242 Mo. 477; State v. Colvin, 226 Mo. 481; State v. Vest, 254 Mo. 458. (b) Evidence which is admissible for any purpose cannot be excluded by the court on the ground that it is inadmissible for other purposes. State v. Bersch, 276 Mo. 416; State v. Finley, 193 Mo. 211; Sotebier v. Transit Co., 203 Mo. 721. (c) The statements were admissible as part of the *res gestae*. State v. Martin, 124 Mo. 524, 529; State v. Lockett, 168 Mo. 480; State v. Sexton, 147 Mo. 89; State v. Sloan, 47 Mo. 604; Greenlee v. K. C. Casualty Co., 192 Mo. App. 308. (d) If error, it was invited and defendant cannot complain. Section 5115, R. S. 1909; State v. Hamey, 168 Mo. 197. (2) Appellant's instruction in the nature of a demurrer was properly overruled. There was suf-

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ficient evidence to sustain the verdict. *State v. Oertel*, 217 S. W. 64; *State v. Selleck*, 199 S. W. 130; *State v. Conley*, 217 S. W. 29; *State v. Mann*, 217 S. W. 67. (3) Appellant's fifth and sixth assignments that the court erred in giving and refusing instructions to the jury are too general and indefinite for review by this court. *State v. Lewis*, 273 Mo. 532; *State v. Selleck*, 199 S. W. 129. (4) Appellant's seventh assignment that the court erred in instructing on conspiracy for the reason that there is no legal and competent evidence on which to base the instruction on conspiracy should be overruled. 12 C. J., sec. 227, p. 634; *State v. Hill*, 273 Mo. 341; *State v. Fields*, 234 Mo. 623; *State v. Sykes*, 191 Mo. 78; *State v. Murray*, 193 S. W. 832; *State v. Bobbitt*, 215 Mo. 39; *State v. Roberts*, 201 Mo. 728; *State v. Forsha*, 190 Mo. 296; 13 R. C. L. sec. 33, p. 723. (5) Alleged error must be properly referred to in the motion for new trial if it is to be saved for review by this court. *Russo v. Brooks*, 214 S. W. 431; *State v. Brashear*, 186 S. W. 1060; *Lust v. Pub. Service Com.*, 210 S. W. 72; *St. Louis v. Railroad*, 248 Mo. 11.

WALKER, J.—Defendant was indicted by the grand jury of the City of St. Louis, together with three others, for murder in the first degree in having shot and killed Henry Becker. A severance was granted and defendant was tried, convicted and sentenced to life imprisonment in the penitentiary. From this judgment he appeals.

Henry Becker was returning to his home on the corner of Compton and Russell avenues in the City of St. Louis at a little before nine o'clock on the night of April 14, 1919. He had alighted from his automobile opposite his residence, the chauffeur had left, and Becker was about to step upon the walk leading from the street to the house when he was shot and robbed of about \$1300 he had on his person. His wife, who was ill and confined to her bed, heard a shuffling, as of feet, on the walk, the report of a gun and an exclamation, "They

have shot me." She recognized her husband's voice and asked her mother to go out and bring him in. The mother and the immediate neighbors, who had also heard the shot, found Becker with his feet lying in the gutter and his head in the street in front of his home. Upon their approach he exclaimed, "I'm shot; I'm shot." He was carried into his home and a doctor near at hand was summoned. He found Becker in a precarious condition. He was panting for breath, his pulse was weak, irregular and rapid, indicative of an internal hemorrhage. An examination disclosed a gunshot wound in his abdomen. To those present he said, "This is a shame, to shoot a man like this. I asked them not to shoot me and gave them everything I had and still they shot me." To his mother-in-law, who was standing near, he said, "Grandma, it's all over with me; I'm a goner." This he repeated several times, adding, "It's a shame to shoot a man like this." Soon after he made these statements he was taken to a hospital, operated on, and died six hours after being shot.

The defendant made a statement to the police after his arrest. The voluntary making of this statement and the correctness of its subject-matter as made by the defendant are attested by several persons. The defendant on the witness stand denied much of it. The material portions of same are that he and the other defendants agreed on the day of the commission of the crime to "hold up" Becker; and that they went to the neighborhood of his residence to await his return to accomplish their purpose; that he and the others were standing on the opposite side of the street from Becker's residence when they saw his automobile approach; that two of the party crossed over the street to a point where the automobile would stop to enable Becker to alight, while he and one of the others remained on the opposite side of the street; that when two of his companions crossed the street defendant ran and when about a block distant he heard a shot fired; that he mounted a street car going east at Compton and Park avenues and got

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off at Eighteenth and Compton, where he found two of the other defendants; that upon his arrival they "split up" the money and he got \$240 for his share; that Kahmann, one of the defendants, said, "they got \$1300 from Becker and that he [Kahmann] shot him because he hollered;" that they then went to a saloon in the neighborhood and had several drinks, bummed around a while and then went to defendant's mother's home, where they had a drinking and dancing party which continued until six o'clock the next morning; that as defendant ran away from the scene of the crime he threw his gun on a lawn about a block west of Becker's house; that he left some of the money he had gotten with his mother and \$150 of it at Stevens's saloon; that he and the other defendants talked about holding up Becker about a week before the occurrence, but that he had said he did not want anything to do with it. The jury believed this statement and not defendant's subsequent denial of same. The truth of his statements in regard to the money left with his mother and the saloon-keeper was attested by them and the money was turned over to the police. The pistol was found where he said he had thrown it. The record discloses other incriminatory facts and circumstances which need not be repeated, enough having been shown to demonstrate defendant's presence and participation in the crime. No question is raised as to the quantum or probative force of the testimony. The defense is purely technical.

I. Error is assigned in the admission in evidence of a statement of the deceased immediately preceding his dying declaration that he had said to his assailants

**Statements of
Deceased.**

"it was a shame to shoot a man in that way." In determining whether an objection to a statement of this character is tenable and hence worthy of consideration, the circumstances under which it was offered in evidence and the manner in which it was made are to be taken into consideration. As to the former, we find, without encumbering this opinion with a rescript of the testimony, that the

statement was brought out at the suggestion of counsel for the defendant. The error, therefore, if any, was committed at the instance of defendant and he should not be heard to complain. [Sec. 5115, R. S. 1909, now Sec. 3908, R. S. 1919; State v. Palmer, 161 Mo. l. c. 174; State v. Hamey, 168 Mo. l. c. 169; State v. Grubb, 201 Mo. l. c. 609; State v. Colvin, 226 Mo. 446; State v. Hutchison, 186 S. W. 1000.]

However, the circumstances under which the statement was originally made furnish a more substantial reason for the overruling of defendant's contention in that it was shown to have been made at the time of the killing and necessarily formed a part of the facts and circumstances attending the crime; in other words, it was so indissolubly connected with the act itself as to form a part of the *res gestae*. The general rule in regard to a declaration of the character here in question is that if it is shown that it was made under such circumstances as to raise a reasonable presumption that the utterance was spontaneous and was created by or sprang out of the transaction itself and was made contemporaneously with the act or so soon thereafter as to exclude the presumption that it was the result of premeditation, then it should not be classified as a mere narrative of a past occurrence, but as a part of the *res gestae*, whether for or against the declarant, and hence not subject to the general rule excluding hearsay testimony. [State v. Lockett, 168 Mo. 480; State v. Brown, 188 Mo. l. c. 451; State v. Kelleher, 201 Mo. 614; State v. Reeves, 195 S. W. (Mo.) l. c. 1030 and cases.]

Finally, the remark is not of such a nature when admitted in evidence as to prejudice the defendant. It did not designate him as one of the assailants and its only probative effect was to show that the wound inflicted was in the commission of an assault; the trial court, therefore, did not err in the admission of testimony in regard thereto.

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II. The instructions to which the defendant objects, other than that in regard to a conspiracy, have not been so preserved as to entitle them to a review. We have frequently ruled upon the manner of objections herein made and have held that something more specific than a general reference to the errors assigned is necessary. It may be conceded that the rule of law invoked by counsel for defendant is applicable to the review of instructions in civil cases, but it does not follow, in the face of an express statute to the contrary, that it is applicable to criminal cases. Section 5285, Revised Statutes 1909 (now Sec. 4079, R. S. 1919) provides that "the motion for a new trial must set forth the grounds and causes therefor." In construing this section we have uniformly held that the instructions complained of should be so designated, either literally, numerically or by reference to their subject-matter, as to enable the trial and appellate courts to determine what instructions are referred to. [State v. Rowe, 271 Mo. l. c. 94 and cases; State v. Chissell, 245 Mo. l. c. 555; State v. Wilson, 225 Mo. 518; State v. Gilbert, 186 S. W. 1003; State v. Gifford, 186 S. W. l. c. 1060 and cases; State v. Miller, 188 S. W. 87; State v. Fleetwood, 190 S. W. 1; State v. Selleck, 199 S. W. 130; State v. Stevens, 220 S. W. 844; State v. Gallagher, 222 S. W. 467.]

Every possible phase of this question, as applied to objections to instructions in motions for new trials in criminal proceedings, has been definitely determined in the cases above cited without a dissenting voice, and there remains no reason for a further discussion of this matter. The requirements of the statute (Sec. 4079, R. S. 1919) are reasonable; its purpose is wholesome; it denies no right of defense to the accused to which he is entitled under the law, and simply requires him to apprise the trial court of the grounds of his objections to the instructions, and not to obscure them and thus mislead the court by what cannot be otherwise properly designated than a dragnet.

III. It is contended that the instruction given at **Converse** the instance of the State based on the evi-
Instructions. dence of a conspiracy should have been supplemented by a converse instruction based on defendant's denial of his connection with such conspiracy. The instruction complained of fully, clearly and fairly defines murder in the first degree and states the facts necessary to be found to establish a conspiracy or a concert of action between the defendant and his co-indictees in the commission of the crime; and it closes with the statement that "unless the jury find the facts to be as stated they will acquit the defendant." This, to the average mind, cannot be construed as otherwise than telling the jury if they find the facts as stated they may convict, but unless they so find them they will acquit. There is, therefore, no opportunity for the jury to have misinterpreted their province and more could not have been accomplished if the court had made a converse statement in detail of the facts which, if found, would have authorized an acquittal. The instructions given, which we have examined for the purpose of enabling us to properly dispose of defendant's contention, fairly presented the law for the jury's guidance under the evidence, and if more was desired a request should have been made therefor. If the instruction complained of had simply told the jury, as in the Rutherford case, 152 Mo. 124, that if they found certain facts to be true they should convict and nothing more, the duty of the trial court to give an instruction telling them that unless they found these facts they should acquit, becomes apparent; likewise in the Jackson case, 126 Mo. l. c. 525, where the court, after stating what facts must be found to authorize a conviction, refused an instruction which stated that unless they so found such facts they would acquit; so, in the Fredericks case, 136 Mo. l. c. 58, where, as at bar, there was evidence of a conspiracy and the jury were told that if they found it to exist they might find the defendant guilty, but did not state that if they found to the contrary they would acquit. These cases, there-

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fore, and they are all that are cited by defendant, base the necessity of a converse instruction upon the absence of the very requirement found in the instruction complained of, which is nothing more than a converse statement of the jury's duty under the evidence. The writer concurred in the conclusion reached by the Commissioner in *State v. Levitt*, 278 Mo. l. c. 378, as to the duty of the court to give a converse instruction to that given at the request of the State in regard to the defendant's explanation of his possession of certain stolen property, but this conclusion was not concurred in by the court, and hence is not an authority. It will suffice to say that if concurred in it would have been under a state of facts and in view of other instructions given which lacked the essential requisites found in that at bar.

There was no infraction in the instant case of the well-established rule that it is duty of the trial court to clearly, in a hypothetical manner, present the facts upon which the State relies for a conviction which, if found by the jury to be true, will authorize a verdict of guilty, and in like manner to present the facts upon which the defendant relies for his defense, which if found to be true will authorize an acquittal. This has been the course pursued from the establishment of our code of criminal procedure, and it was not departed from in the instant case. There is, therefore, no merit in the defendant's contention that a converse instruction should have been given.

Human depravity reached its lowest level in the commission of this crime. It was a ruthless, cold-blooded murder. Its cruel and sordid details are relieved by none of the palliating circumstances sometimes present and often interposed as defenses in cases of homicide. Despite these facts, the statement of which cannot but appall the normal mind, the defendant was accorded a fair and impartial trial and has no just ground of complaint. The judgment of the trial court is therefore affirmed. All concur.

CHRISTIAN SCHEERER v. FELIX SCHEERER,
Appellant.**Division Two, March 23, 1921.**

1. **PURCHASE OF LAND: Oral Contract: Specific Performance.** The Statute of Frauds is an insuperable barrier to the enforcement of an oral contract for the purchase of land, unless the proof of such contract is so clear, cogent and convincing as to leave no reasonable doubt in the mind of the chancellor as to its terms and conditions; and where part performance is relied upon to take the case out from under the operation of the statute, there must be like proof that the acts performed refer to the contract and would not have been done unless on account of and in pursuance to it and with a direct view to its performance.
2. ———: ———: **Part Performance: Possession.** Taking and continuing in possession by the vendee under an oral contract for the purchase of land, with the vendor's consent, the payment of a substantial part or all of the purchase price, and the making of substantial improvements, are acts of performance when referable solely and unequivocally to the contract. The taking of possession alone is not generally recognized as sufficient part performance, but taking possession, followed by the further act of part payment, or the making of improvements, is sufficient to validate the parol contract.
3. ———: ———: ———: **Signing Deed.** Where the vendee made substantial part payment, went into possession, made valuable improvements, and afterwards made other substantial part payments, all referable solely to the parol contract of purchase, and a receipt for a large payment was given with the vendor's name attached thereto, and his testimony as to whether he signed the receipt is evasive, and he signed a deed in exact harmony with and in pursuance to the parol agreement, which he refused to deliver and accept a deed of trust for the balance, the evidence showing that a desire to avoid taxes being controlling, the contract will be specifically enforced, there being no other rational hypothesis on which the signing of the deed can be explained.
4. ———: ———: **Indefinite Terms: Cured by Interpretation.** An objection that the parol contract pleaded is indefinite as to the payments to be made by the vendee before the vendor would

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make a deed, is cured by an allegation and proof that on the making of certain payments the vendor agreed to make a deed, which he did sign but did not deliver, for this was an interpretation of the contract which made it definite.

5. ———: ———: **Time of Payment: Interest as Compensation for Delay.** Where the time of payment of the purchase price of land was optional with the vendee, as it suited his convenience, the law implies a reasonable time; and where the vendor accepted a second payment five years after the sale, time was not of the essence of the contract. And ordinarily, where the time of payment of the purchase is optional with the vendee, the payment of interest on the deferred payments will be sufficient compensation for the delay.
6. ———: ———: **Homestead: Wife's Consent.** Where the land the vendor orally agreed to sell was his homestead, enforcement will not be denied on the ground that he could not sell it without the concurrence of his wife, where he sold it with the intention of abandoning it, acquired another homestead which he still occupies, accepted payments on the purchase price years after the sale, and permitted the vendee to remain in possession, exercising acts of ownership, for fifteen years.
7. ———: ———: **Specific Performance: Wife's Inchoate Dower.** The wife not being a party to the parol contract for the sale of land or to the suit to specifically enforce, although it is clear that it was mutually understood that the vendee was to have a deed executed by both the vendor and his wife, and the vendee being entitled to a decree of specific performance, the purchase price should be diminished by the value of the wife's inchoate dower, unless she will join the vendor in the execution of a deed.

Appeal from Moniteau Circuit Court.—*Hon. J. G. Slate,*
Judge.

REVERSED AND REMANDED (*with directions*). . .

Embry & Embry, S. C. Gill and Roy D. Williams
for appellant.

(1) When a verbal agreement has been properly part performed, say by the purchaser, equity recognizes in him exactly the same primary right which would have existed, if the contract had been written. The right to

have the very thing done, which was agreed to be done. If this primary right or duty is violated by vendor's refusal to perform, equity gives to the vendee its remedy of specific performance. Pomeroy's Equity (2 Ed.), sec. 103; Pomeroy's Equity (2 Ed.), sec. 1409. (2) Equity will not permit the respondent in this case to withdraw from the contract he entered into with appellant. It would be a great injury to appellant to permit respondent so to do. Appellant had paid a portion of the purchase price, had been placed in possession under contract of sale, and had made valuable and permanent improvements. Equity aids in compelling specific performance under circumstances of this nature. *Berg v. Moreau*, 199 Mo. 416. (3) Where one in pursuance of and on the faith of an oral agreement and promise of the owner that he shall have a deed for the land, enters into possession and makes valuable improvements, the case is taken out of the Statute of Frauds, and specific performance should be decreed. *Anderson v. Shockley*, 82 Mo. 250; *Dougherty v. Harsel*, 91 Mo. 161; *Hubbard v. Slavens*, 218 Mo. 620; *Lambert v. Railroad*, 212 Mo. 693. (4) In the case at bar, the contract is shown by a great preponderance of the evidence. In fact, a deed was executed by the vendor under the verbal contract. Vendor simply refused to deliver the deed. He received from time to time interest on all unpaid purchase money, and received four different payments on the purchase price. He has refused to make a deed pursuant to his verbal agreement. He has retained the \$1400 paid on the principal purchase price, in addition to the interest. He has not offered to return this sum. He simply proposes to keep all that has been paid to him, and also to keep the land that he had agreed to convey. Appellant, pleads and proves that he is ready, willing and able to meet all sums due on the purchase price and has been thus ready at all times. The decree of the court should have been in favor of the appellant, and upon the payment into court of the unpaid purchase price title should have been decreed in appellant.

John M. Williams and *George H. Williams* for respondent.

(1) The defendant failed to establish the allegations of his cross-bill. (2) The evidence discloses a contract between father and son altogether different from that alleged in the answer. (3) The defendant broke the contract made with his father and was not entitled to equitable consideration even though he had relied in his answer on the contract he actually made. The default of the son was willful. (4) The contract really made could ripen the possession of the son into a title upon two conditions: (a) compliance by the son and (b) the death of the parents. Breach of the contract by the son would leave him without remedy in equity; and a court of equity could not accelerate the death of the parents. (5) The agreement as alleged in the cross-bill was to be executed "when the defendant was ready to make some additional payments on the land." Such an agreement is not enforceable because of indefiniteness. Such contracts must be "clear, definite and unequivocal." *Goodin v. Goodin*, 172 Mo. 48; *Huff v. Shepard*, 58 Mo. 242; *Hilliard on Vendors*, 153; 4 Kent (10 Ed.), 534. (6) The cross-bill shows the defendant broke the contract he alleges he made, and the testimony proves he broke the contract actually made. In such case ejectment is the proper remedy. *Gibbs v. Sullens*, 48 Mo. 237; *Goodin v. Goodin*, 172 Mo. 43. (7) Even if the allegations of the cross-bill relating to the contract and the proof in support were as definite as that required in *Grantham v. Gossett*, 182 Mo. 671, or in *Goodin v. Goodin*, 172 Mo. 48, or in *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 315, yet the relation of the parties is such as to keep the case within the Statute of Frauds. *Emmel v. Hayes*, 102 Mo. 195; *Rosenwald v. Middlebrook*, 188 Mo. 93. And, in such relationship, the payment of a part of the consideration, or improvements made by the son on the father's land, or possession when accompanied by improvements, will not be treated

as part performance. Pomeroy on Specific Performance (2 Ed.) secs. 112, 127, 115; Eckert v. Eckert, 3 P. & W. (Pa.) 332.

HIGBEE, P. J.—Christian Scheerer is the father of the defendant. November 7, 1918, plaintiff brought this action of ejectment for the recovery of a farm in Moniteau County, containing about 100 acres, laying the ouster on August 8, 1918. The first count of defendant's answer is a general denial. The second count avers that plaintiff was the owner of the land, and that on August—, 1903, defendant purchased it from plaintiff at the price of \$5500, and, on or about August 20, paid \$500 thereon; that plaintiff put defendant in possession and agreed that when defendant was ready to make some additional payment on the land plaintiff would execute a deed to defendant for the farm; that he also paid on the purchase price, February 1, 1910, \$500; June 1, 1910, \$200; July 25, 1912, \$200; and that he paid all interest during the years stated; that defendant made improvements thereon of the value of more than \$600; that shortly after the purchase of said land plaintiff made a deed therefor to defendant, but when requested to deliver it refused to do so, or to deliver it to a bank in escrow; that defendant was ready, able and willing to make full payment when he requested the delivery of the deed; that in the year 1912 plaintiff informed defendant he would never make him a deed for said premises and has never done so; that on or about August 20, 1912, there was due plaintiff \$4100 for the purchase price of said land, which, with the interest, and taxes on said land paid by plaintiff since the year 1912, amounts to \$6000, which sum he offers to pay into court for the benefit of plaintiff. Wherefore he prays the contract be specifically performed.

The reply is a general denial, and further avers that the alleged contract was not to be performed within a year, was not reduced to writing, and was void under the Statute of Frauds.

Scheerer v. Scheerer.

The case was tried May 7, 1919, and judgment rendered for the plaintiff, assessing his damages at \$500 and the monthly rents and profits at \$40, and dismissing defendant's cross-bill. Motion for new trial being overruled, defendant appealed.

Plaintiff bought the farm in 1899 and lived on it with his wife and son, the defendant, a bachelor of mature years. The defendant had been working on the farm and was to receive one-third of the income. It seems that plaintiff kept all the income, and in the summer of 1903 the son concluded to leave the farm and talked about buying a restaurant in Tipton.

Gallaher, a witness for plaintiff, testified he heard a conversation between the plaintiff and defendant early in August, 1903. Plaintiff said his son should take the farm at \$5500, giving plaintiff \$275 per year, and Felix would have it when plaintiff and his wife died; that would be five per cent on \$5500 for the rental value of the land. Felix seemed satisfied. That was a fair price for the land. The rental value now is \$7 per acre. This talk was in Tipton, in Steinkraus's shoe shop. Six months after this plaintiff went to Tipton. His son was not married; he married in January, 1905. None of this \$5500 was to be paid, nothing but the rent during the intervening period. Nothing said about making a deed.

Felix Scheerer testified: "I lived on the farm with father and mother about five years; have been in possession alone about fifteen years. Father was to give me one-third of what we made on the farm, but he had never settled with me from the time we moved there until this August, 1903, and I asked for a settlement and told him I wanted to work for myself. He figured up and wrote me a check for \$900, but that included my mare, wagon, farm tools and cow at what I paid for them, \$400, and he aimed to keep them when he gave me this check. After he settled with me he went out of the house, and my mother said she didn't want me to leave, but to stay and run the farm; they were getting old and would have to rent or sell it. I said I would not rent the place,

but I will buy it if father will sell it on time. Mother said to go and see him. I went to the barn and asked him. He said he would sell me the farm at \$5500 and charge me five per cent on the money. I said that was all right; I have \$500 in this check, I will give it back and consider \$500 paid on the place and keep my stock and pay you \$250 interest a year, and he said that was all right. He said I won't make you no deed until you have more money to pay off on it. Next thing he said was, I will pay the taxes if you will furnish me my wood, and I said I would do that, haul it to town, and I did that up until and including 1912. He has paid the taxes. Father moved to town. The next payment I made on the land was February 1, 1910, \$500. (Witness here produced a receipt which he said he had carried in his pocket book). I wrote it and father signed it at his house in Tipton. It reads: 'Tipton, Feby. 1, 1910. Received of Felix Scheerer one thousand dollars payment on tract of land of ninety-two acres of land. (Signed) Christ. Scheerer.' I told father he had given me nothing to show for that first \$500. He said just make this receipt for \$1000, this \$500 and the \$500 I paid him when I bought the place. I paid this \$500 with check for \$375 and \$125 in cash. (Witness produced check). I gave this check to my father. The check is marked paid. I paid father \$200 middle of June, 1910, in cash. He said if people knew he had money he would have to pay taxes on it. The next payment on the purchase price was July 25, 1912, \$200. The total payment on the purchase price was \$1400. I paid the interest, \$250 in 1904, \$250 the next year. From 1903 on down to 1912 I paid five per cent interest on the unpaid purchase price each year. I put up one and three-fourths miles of hog wire fence, built a closet and two hen houses, a shed and garden fence; cost a little better than \$600. I also covered the house, replastered two rooms, painted house and barn and other buildings. When I paid father the second \$500 and he had me write the receipt; he said he would have a deed made, and ten days or two weeks

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later when I was there he brought me the deed. I read it over; it described the land, but mother hadn't signed it. He said I will keep this deed here; in case something happens to me your mother can still sign this deed and hand it over to you. About October 1, 1913, I was going to make another payment of \$100 and the interest, and I told him I wanted him to make me the deed so I would have something to show how we stood. He said, 'Didn't I give you a receipt for \$1000?' I said I have paid \$400 since that. He said he never would make the deed; I said I would pay no more money till he made me a deed. I had Mr. Embry, my attorney, draw up a contract and see him, but he never signed it. This contract, dated July, 1914, recites the sale of the farm to Felix Scheerer in August, 1903, for \$5500; that \$1400 has been paid on the principal sum and all interest to date; that a warranty deed to said land in favor of Felix Scheerer has been placed in the Farmers' Bank at Tipton, which deed shall be attached to this contract and held as long as Christ. Scheerer shall live and then delivered to Felix Scheerer. Interest at five per cent shall be paid on unpaid purchase price, and any sum remaining unpaid at my death shall be paid to my executor or administrator. Including last year, the way I figured it, there was about \$6000 due on the premises. I offer to pay that into court. I am able and willing to pay it."

Cross-Examination: "I didn't want to stay on the farm as a renter. Father paid the taxes since 1913. Father had insurance on the buildings. I paid the insurance up to 1913. I had it insured three years ago. In the fall of 1904, I borrowed \$300 of father to buy 14 acres. I paid that back in January, 1905. I also borrowed \$300 from him to buy some cattle. I paid that back in 1905. I also borrowed \$65, and at another time \$40. He said he kept a book account of it. There was no running account between us. I paid all that back. In October, 1913, I was going to make this additional payment of \$100 and the interest. I then owed father \$4100 on the land. I offered to give him a deed of trust. I built

the shed and barn after October, 1913. The place was worth \$135 an acre in 1913. The reason I paid the \$200 in money was because father didn't want to pay taxes on it. In April, 1913, my sister paid father \$2500 that he had loaned her. I stopped paying father because he wouldn't make me any papers to show I was paying him."

Redirect: "Father said if he took a deed of trust he would have to pay taxes on it."

William Smith testified: "I have known Mr. Scheerer since we were boys; always have been friends. In 1904 or 1905 he told me he had sold this place to Felix for \$5500, and he says: I ain't going to make him no papers; if I do—I am going to pay the taxes on the land; if I take a deed of trust I would have to pay taxes on that and he would have to pay taxes on the land and it would be double taxes and, he says, he has got a contract."

William Vogelbecker testified: "I know Christian Scheerer. He said he sold the place to Felix for \$5500, and he wasn't going to make him a deed because he didn't have to pay no taxes on the money you know. That was in 1915 or 1916."

Alva White testified: "I saw Christian Scheerer in Steinkraus's shop in Tipton about August, 1914, I had a contract about the trade between Scheerer and his son. I got it from Felix. Christian Scheerer talked about it. The main reason why he wouldn't sign it was because Felix didn't marry to suit him. He said if Felix thought that woman would get this place—and he said that was his life-long labors and he didn't want her to have it. He didn't particularly object to Felix getting it. He said he had sold the place to Felix, and made the deed, and had the deed at home, and would in time give it to him, but he wanted to control it as long as he lived—the deed; he wanted to keep it in his possession."

Christian Scheerer testified: "I am seventy-six. I have three children. Felix there *was*. He is forty-six, and Pauline and Mamie. I bought the farm in 1899. I had an arrangement with Felix in 1903. The last of July,

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1903, he left me. He sold his cow and went to Oklahoma on Thursday; came back Sunday. He bummed in town near four days and wanted me to settle up; he wanted to buy a restaurant. So I told him, if I sell it to keep him away from town. I promised him the land after my death for \$5500. He would pay me \$250 the year. I rented him the place. I moved out in the spring. He wanted \$300 to buy thirty acres of land off Snorgrass, and I told him to go to my son-in-law, Keisling, get the money, and I will pay him back. He afterward borrowed \$350 to buy cattle. He didn't pay me \$500 on the land. I made the settlement. He kept the stock. I didn't give him a check for \$900, not as I know. He paid me off every year. I kept books. I charged him with what I gave him. He never pay me since '11, always a year back. The last payment, he paid me for '12, or '11, I mean. In '13 he didn't pay nothing. There is where he demanded a deed from me. I told him as long as me and my wife been living I never would sign the deed to anybody. Mr. Embry says that he deposit the deed in bank. I said I would do that after my death, but not before. He paid me \$500 in 1910, that was in '09

"Q. Did you sign this (Showing receipt for \$1000)?

A. Not as I remember, because he never had \$1000 to pay me. I never got \$1000. I did not owe him \$500 in 1903. I owe him nothing. He kept his stock, the wagon and stuff. He wanted to buy a restaurant. He made these payments of \$200 in 1910. That would be \$900 on account of what he owe, and Mr. Embry made that contract. I was willing to do that if he come up and settle with me. He owed me more than this. He broke his contract since by not paying the rent since 1912. I bought a house in town. My wife and I live in that. I have paid all the taxes and the insurance. I think in them last three years once in a while he paid some."

Cross Examination: "I don't know in my head exact-what he owed me any more. I had made a deed conveying the land to Felix. You (Embry) wanted me and my wife to go down with you and make the papers.

I say, 'No, we can make the papers up here.' You say my wife didn't sign it; it wasn't no account. I never had \$1000 and I never gave a receipt for \$1000.

"Q. Did you sign it? A. I never got the \$1000, I tell you. I never sign it. If them \$1000 would be here that's different. That is not my signature. That check \$375 may be all right. I never took it on the land. He owe me in the beginning \$650. He had money from me six or seven years and every year I count off with him to how we stand. In June, 1910, I got some money from him. Payment on the land? nothing.

"Q. Hasn't he paid you \$1400 on the purchase price of the land? A. He hasn't paid me five cents at the present time. He owe me \$600 or \$700. He paid nothing on the land.

"Q. In 1912 didn't Felix offer to give you a deed of trust for \$4100? A. Yes. He asked me, but I didn't. Taxes had nothing to do with it. Why I promised that he should have the land. I paid \$400 to my son-in-law Keisling. He got it from him and I paid it back to Keisling, and then he borrow 14 acres of land.

"Q. Did he make you some payments on the land? A. Well, I don't know if a man call it payments, or if I call it a running account.

"Q. How much of the \$5500 has he paid? A. Nothing."

Redirect: "I had a running account with Felix in my book." (Here the witness again enumerated the items above mentioned and a few other small charges that he said appeared on his book, a copy of which, in English, he produced). Plaintiff's counsel, referring to the receipt, asked him:

"Q. Did you sign it? A. Well, I ain't sure; I can't swear to it."

Felix Scheerer testified: "I don't understand them figures that father has copied from his book. I paid the first and second \$500 and then two \$200 payments on the place, and told him so. Father signed the receipt. It is now just as it was, with the exception of being folded and worn."

I. The plaintiff relies upon the Statute of Frauds as a defense to the defendant's plea for specific performance. There can be no question that the statute is an insuperable barrier to the enforcement of specific performance of an oral contract for the sale of land, unless the proof of such contract is so clear, cogent and convincing as to leave no reasonable doubt in the mind of the chancellor as to its terms and conditions; and where part performance is relied on to take the case out of the operation of the statute there must be like proof that the acts performed refer to that contract and would not have been done unless on account of and pursuant to that very agreement and with a direct view to its performance. [Collins v. Harrell, 219 Mo. 279, l. c. 301; 36 Cyc. 647.]

Within a decade after the enactment of the statute in England, it was found that its literal enforcement would result in frauds and hardships more widespread than those which it was designed to suppress. It was realized that in many instances the statute itself was made an instrument of fraud.

At an early day the rule of part performance, under the limitations above stated, was adopted in England and in most of the jurisdictions of this country. It has long been the rule in Missouri. The taking of and continuance in possession by a vendee under a parol contract made by a vendor, with his consent, the payment of a substantial part or all of the purchase price, and the making of valuable improvements are acts of part performance, when referable solely and unequivocally to the parol contract. There must be a radical change in the attitude of the parties towards each other, a change consisting of acts done that of themselves indicate that some contract has been made between the parties. Parol evidence is then admissible to show the details of the agreement. [Shacklett v. Cummins, 270 Mo. 496, l. c. 499.] Indeed, the rule in England is that taking possession is of itself sufficient part performance, but that rule has not been

**Parol
Contract.**

**Part
Performance.**

generally recognized in this country. The rule here is that taking possession, followed by the further act of part payment, or the making of improvements, as an act of part performance, is required to validate the contract. [36 Cyc. 654.] Do the facts in this case meet these requirements?

II. It is altogether natural that the defendant should have concluded, after five years of unrequited labor on his father's farm, to insist on a settlement and take up some other line of endeavor. He was thirty years of age, unmarried, and had accumulated but a few hundred dollars' worth of personal property. Note the plaintiff's evidence: "*I made the settlement. He kept the stock.*"

Facts
Showing
Performance.

That his son was to quit the honorable and independent life of a farmer and engage in running a restaurant in a little country village evidently grieved the plaintiff, but he appears to have been unable to undertake a reconciliation. It was the mother who, in this crisis, intervened with the hope of inducing her son to remain on the farm, and thus avoid an estrangement. She suggested that he see his father and buy the farm. It was then the father said: "*I told him if I sell it to keep him away from town.*" He admits that his son paid him \$500 February 1, 1910, \$200 in June, 1910, and \$200 in 1912. He admits he signed a deed and, no doubt, but for his obsession about eluding the payment of taxes, the sale and conveyance would have been happily closed by his taking back a deed of trust for the unpaid purchase money. His quibbling and evasive denials of signing the receipt for the \$1000 paid on the farm discredit his testimony. "If them \$1000 would be here, that's different." When pressed by his own attorney, "Did you sign the receipt?" the answer was, "I ain't sure; I can't swear to it."

III. When we consider the testimony of Smith, White and Vogelbecker, in connection with all the other

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facts and circumstances in the case, there can be no reasonable doubt that plaintiff verbally contracted to sell the farm on the terms sworn to by his son.

**Receipt:
Signing
Deed.**

The execution of the deed can be explained on no other rational hypothesis. Nor can there be any reasonable doubt that he signed the receipt acknowledging payment of \$1000 on the farm. This receipt, although an incomplete memorandum, is unequivocal evidence of an antecedent contract of sale, and that the payment was made solely with reference to that contract. He told Smith, White and Vogelbecker his real reasons for not delivering the deed; he didn't like his daughter-in-law; she should never have the land; it was his life savings; if he took a deed of trust he would have to pay taxes on it and Felix would be taxed on the land. Taxes were his nightmare. Shylock-like he would hold fast to the deed until Death released his grasp; then the mother could sign and deliver it to Felix. There was no suggestion, when talking with his old neighbors, that he did not sell the farm, or that Felix had not made satisfactory payments. These poor, frivolous, unreasonable pretexts were the only excuses he could offer for not keeping faith with his son. They demonstrate the barrenness of his defense. They are a confession of the justice of his son's claim. *Expressio unius.*

The statements to Smith, White and Vogelbecker cover a period of eleven years, from 1904 to 1915. During all that time his statements and actions were inconsistent with his testimony at the trial. He surrendered possession of the farm to his son in April, 1904, and acquired another homestead. His son has ever since retained exclusive possession of the farm and made valuable improvements. He made payments thereon to his father which were satisfactory, else the father would not have signed the deed. That he made the improvements and also made the payments on the land solely with reference to and in execution of the contract of purchase, clearly appears, not only from the testimony

of the defendant, but by the terms of the receipt and the fact of the execution of the deed. That the payments were made on other indebtedness, if there were any, is inconsistent with his statements to the witnesses (not questioned by plaintiff), the receipt and the deed, which he admits he signed and told Embry he would deliver after, but not before, his death. These radical changes point unerringly to the antecedent contract of sale clearly established by the evidence. To deny specific performance under the evidence would make the statute an instrument of fraud.

IV. It was objected at the trial and in respondent's brief that the contract pleaded is indefinite as to the payments to be made by the defendant before plaintiff would make a deed, but the answer also avers that on the making of certain other payments, the plaintiff agreed to and did make a deed. This was plaintiff's interpretation of the contract. The averments referred to are sufficient; at least after judgment.

V. There was no time fixed for the payment of the purchase money. That was optional with the son, as it suited his convenience. Where no time is fixed, ordinarily the law implies a reasonable time. The plaintiff accepted a second payment on the purchase price nearly five years after the contract of sale. Clearly, time was not of the essence of the contract. In contracts of sale between strangers, failure to pay at the time stipulated will not usually work a forfeiture or authorize a rescission. It will ordinarily be inferred that interest on the defaulted payment will be sufficient compensation for the delay, compensation and not forfeiture being a favorite maxim with courts of equity. [39 Cyc. 1368; Scannell v. Am. Soda Fountain Co., 161 Mo. 606, l. c. 621.]

The defendant, in his answer and on trial, offered to pay the residue of the purchase price, with all inter-

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est, into court. That is all that is required in an action for specific performance of a contract of this character.

VI. The contention that plaintiff could not sell his homestead without the concurrence of his wife is not pleaded. He made the contract for the sale of his farm with the intention of abandoning it as a homestead. He bought and removed to his residence property in Tipton which he still occupies as his homestead. He cannot have two homesteads at the same time. [Stanley v. Baker, 75 Mo. 60, l. c. 62.] After acquiring a new homestead he accepted payments on the purchase price of his farm and allowed defendant to continue in possession, exercising acts of ownership, for fifteen years, and so ratified the contract.

VII. Another question, not mentioned in the briefs, must be considered. The wife of the plaintiff is not a party to the action nor to the contract of sale. That it was mutually understood that the defendant should have a deed executed by his father and mother cannot be doubted. Being clearly of the opinion that the defendant is entitled to a decree of specific performance, how shall the decree be framed in the event plaintiff and his wife do not join in executing a deed of conveyance to the defendant? In that event the purchase price should be diminished by the value of the wife's inchoate dower.

In Tebeau v. Ridge, 261 Mo. 547, l. c. 571, Court in Banc, in an opinion by Judge FARIS, said:

"If then such contracts are to be enforced—and the rule is that while the enforcement thereof is in the discretion of the chancellor, the discretion to be used is a sound judicial, and not a capricious, discretion, and also the rule is that other things being equal they are to be enforced—then in my opinion both the weight of authority and the reason of the thing lie with the view that there should be a diminution of the purchase price by the present value of the wife's inchoate dower. The defaulting optiongiver should not get the whole pur-

chase price and then as a reward for his breach of contract keep one-third of the title in a life-estate in the family.”

See foot of page 574 for the basis of reckoning the value of the wife's inchoate dower. [See, also, 39 Cyc. 1582.]

The judgment is reversed and the cause remanded, with directions to the trial court to ascertain the remainder due to plaintiff from the defendant on the purchase price of the land described in the petition, with interest at the rate of five per cent per annum from July 25, 1912, and taxes, if any, paid by plaintiff since the year 1912, with six per cent interest thereon, and, upon payment into court of these sums by defendant within a reasonable time, to be fixed by the court, to order specific performance and that the sums so found due be paid to plaintiff, if plaintiff and his wife will execute a deed conveying the premises in controversy to defendant, or, if within a reasonable time, to be fixed by the court, the plaintiff and his wife do not execute a good and sufficient deed conveying said lands to defendant, the court shall enter a decree divesting all the right, title and interest of the plaintiff in said premises and vesting the same in defendant in fee upon the payment into court by defendant for the plaintiff of the said sum so found due and taxes as aforesaid (if any) diminished by the value as of the time of the trial (May 7, 1919) of the inchoate dower of plaintiff's wife in the one-third part of said premises, calculated at six per cent upon the basis of a life in the contingent dowress in excess of the plaintiff's expectancy, if any, according to the American experience table (Sec. 5968, R. S. 1879), all costs to follow the decree. All concur.

THOMAS WARD McMANUS v. MATTHEW PARK,
Trustee, Appellant.

Division Two, March 23, 1921.

1. **LAWS: Retrospective Operation: Remedy.** The provision of the Constitution declaring that no law "retrospective in its operation can be passed by the General Assembly" applies only to acts which would affect vested rights, and not to statutes which are remedial only. No one has a vested interest in the form of procedure; no one has a vested right to have his cause tried by any particular mode. Acts changing remedies in any way that does not destroy or impair vested rights are excluded from the operation of said constitutional provision, even when they are intended to apply to existing conditions. The remedy applies to the future, but as a remedy it may operate upon property rights and interests already vested. To be retrospective in the constitutional sense it must impair a vested right.
2. ———: ———: ———: **Annual Accounting of Trustee.** The Act of 1911 (now Secs. 13429 and 13430, R. S. 1919), requiring a trustee vested with the title to an estate to make an annual report to the circuit court, applies only to procedure, is remedial in its operation, and does not affect the rights of a trustee who became vested with the estate prior to its enactment. Such trustee has no vested right in the manner of accounting for his trust.
3. ———: ———: **Act of 1911: Ambiguous Terms: Construction: Remedy.** Where a statute is ambiguous in its terms and affects substantive or vested rights, all ambiguity therein will be resolved in favor of its prospective operation and its constitutionality; but where the statute relates to the remedy and is ambiguous or of doubtful application, it is liberally construed in order to effectuate the purpose of its enactment, and to that end all doubts are resolved so as to affect past as well as future transactions. The evident purpose of the Act of 1911, requiring trustees to make annual reports to the circuit court, was that said remedy should apply to all trustees, whether appointed by the court before or after its enactment. It applies to a will disposing of an estate before as well as after the passage of the act, and it applies where a trustee appointed by the will "has become disqualified to act, resigned or died," and it applies to trustees appointed by the court before the act was passed.

4. ———: ———: ———: **Trustees: Named in Trust Instrument and Appointed by Court.** A relation of personal trust exists between the testator in a will and the trustee appointed thereby; the trustee appointed by the court, upon the removal, death or resignation of the trustee appointed by the will, is under no personal obligation, but only his official obligation to account to the beneficiary, or to exhibit the state of the property in his charge, and before the Act of 1911 was enacted there was no way to compel an accounting from him except upon an allegation of mismanagement, fraud or incompetence, and the very purpose of having accounts filed was that the beneficiary might ascertain whether there was fraud or incompetence which would justify action against the trustee; and the purpose of said act was that the circuit court might retain jurisdiction of the appointed trustee in all matters pertaining to the administration of a trust estate, and compel him to make an annual report of the condition of the estate, and to meet the contrary ruling in *State ex rel. McManus v. Muench*, 217 Mo. 124.
5. ———: **Title.** Where the terms of an act are ambiguous, recourse may be had to its title to ascertain the intention of the Legislature; and the intention expressed in the title of the Act of 1911, requiring trustees to report annually to the circuit court the condition of the estate, clearly shows it is retroactive in its operation, and applies to all trustees.
6. ———: **Constitutional Question: Not Raised at Trial.** A contention that an act is unconstitutional as class legislation, if the question was not raised in the trial court, cannot be considered on appeal; on the contrary, appellant can appropriately urge on appeal a construction of the statute which will render it constitutional, if that contention was made below.

Appeal from St. Louis City Circuit Court.—*Hon. Victor H. Falkenhainer*, Judge.

AFFIRMED.

Leighton Shields for appellants.

(1) No cause of action is stated in the plaintiff's petition requiring the filing in court of an accounting by the defendant trustee, as a matter of equity or as a matter of law, absent a special statute providing such duty. *State ex rel. McManus v. Muench*, 217 Mo. 124. (2) The

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Act of 1911, does not create a duty requiring the defendant trustee to file in court an accounting, because such act applies only to trustees appointed by the court, and executing trusts created under wills, which became effective after the enactment of the statute. (3) In interpreting this statute, section 1 controls the conditions of the jurisdiction conferred by the act and provides a prospective operation. *Straughan v. Meyers*, 268 Mo. 588. (4) This statute must be construed as having a prospective effect without exception as to its character. *Leete v. State Bank*, 115 Mo. 184; *State ex rel. v. Wright*, 251 Mo. 325; *State ex rel. v. Greer*, 78 Mo. 188; *Shields v. Johnson County*, 144 Mo. 76; 6 Am. & Eng. Ency. Law, 939. (5) This statute must be construed so as to save it. Sec. 15, Art. II, Mo. Constitution; *Hope Ins. Co. v. Flynn*, 38 Mo. 483; *Clarke v. Railroad*, 219 Mo. 532; 36 Cyc. 974; 8 Cyc. 801. (6) This statute is not "remedial" in the sense used by the authorities, i. e., relating to the course and form of proceedings for the enforcement of a right, but even if it were "remedial" it must be construed as having a prospective effect. *Clarke v. Railroad*, 219 Mo. 524; *Leete v. State Bank*, 115 Mo. 184. (7) This statute is unconstitutional and void because it is special or class legislation. Art. IV, sec. 53, par. 32, Mo. Constitution; *State ex rel. v. Iron Co.*, 268 Mo. 178; *State ex rel. v. Logan*, 268 Mo. 169; *State ex rel. v. Roach*, 258 Mo. 561; *Bridges v. Mining Co.*, 252 Mo. 53; *State ex rel. v. Miller*, 100 Mo. 448.

D. D. Holmes for respondent.

(1) The case of *State ex rel. v. Muench*, 217 Mo. 124, in so far as it strips the circuit court of authority over trustees appointed by the court to succeed those named by will, should be overruled, as it is against the established weight of authority. 39 Cyc. 515, 316, 317; *Perry on Trusts*, sec. 474; *Lewin on Trusts* (Am. Ed.), p. 617, par. 16; *Gottschalk v. Trust Co.*, 102 Md. 521; *Cromey v. Bull*, 4 K. L. Rep. 787; *Bispham's Principles of Equity*

(9 Ed.), secs. 135, 148; *Minors v. Batteson*, L. R. 1 App. Cases, 428. (2) The court appointing a trustee, or the court to which a trustee has applied for directions concerning the administration of his trust, has thereafter complete jurisdiction over the trustee and the trust estate, and can compel an accounting. Same authorities. (3) Under the statute the court has power to compel an accounting by the trustee. *Laws 1911*, p. 430. (4) The Act of 1911 is, by its terms, retroactive, so as to include within its provisions trustees appointed prior to its enactment. In construing the statute, its title, as well as its contemporaneous history, should be taken into account. *People ex rel. Colling v. Spicer*, 99 N. Y. 233; *Straughan v. Meyers*, 268 Mo. 588; *Ins. Co. v. Talbot*, 113 Ind. 379. (5) The act is remedial, and should be construed to operate retroactively. 36 Cyc. 1209; *Black on Interpretation of Laws* (2 Ed.), pp. 403-4; *Ins. Co. v. Talbot*, 113 Ind. 378; *Clark v. Railroad*, 219 Mo. 532; *Abbott v. Mining Co.*, 255 Mo. 378. (6) The Act does not violate Art. IV, sec. 53, par. 32, of the State Constitution, as class legislation. *Ex parte Loving*, 178 Mo. 209; *Hawkins v. Smith*, 242 Mo. 695.

WHITE, C.—This is a proceeding brought by the plaintiff to compel an annual accounting by defendant, as trustee of the estate in which the plaintiff was one of the beneficiaries. The defendant filed a demurrer to the petition, which was overruled; defendant declined to plead further and judgment was entered for plaintiff in accordance with the prayer of the petition, from which judgment defendant appealed.

The accounting prayed for is that required by the Act of 1911 (*Laws 1911*, p. 430), Sections 13429 and 13430, Revised Statutes 1919. The will of Camilla S. McManus, mother of the plaintiff, was probated November, 1905. One William F. Crow was appointed by the will trustee of a certain fund mentioned in the will. Crow died in December, 1907. On a proceeding brought in the Circuit Court of St. Louis, in May, 1908, the defendant, Matthew

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Park, was appointed by that court as the successor of Crow.

The defendant herein asserts that the petition states no cause of action, because it shows that the Act of 1911, providing for annual accounting of a trustee appointed by the circuit court, was passed subsequent to his appointment, and the vesting of the trust estate in him. The will, attached as an exhibit to the petition, executed in 1896 by Camilla S. McManus in the City of Saint Louis, after certain other provisions, devises to the son of testatrix, Walter McManus, one-third, and to the daughter one-third, of all the estate, and then provides for the trust as follows:

“Fifth: I give, bequeath and devise to my friend William Crow, of the City of St. Louis and State of Missouri, a like one-third part of all my estate, real, personal and mixed, and wheresoever situated, to have and to hold the same as trustee for the uses and purposes hereinafter stated. I hereby give said trustee, or his successors in this trust, full power, with the approval of the St. Louis Circuit Court, to sell any of the property subject to this trust. I hereby authorize and direct said trustee, from time to time, to invest all moneys and the proceeds of all property subject to this trust that may be sold, either in well secured first mortgage loans on improved real estate in the City of St. Louis and State of Missouri, or in other well approved securities, and to pay the net income received therefrom, together with the net income received from all of the property subject to this trust, semi-annually to my granddaughter, Camilla S. Wolcott, during her life. Should my granddaughter, Camilla S. Wolcott, die and leave surviving her my two children, Thomas Ward McManus and Maggie Emma McManus, then it is my will that all the property held subject to this trust be divided equally between my two children; and if but one of my two children shall survive my said granddaughter, then it is my will that all the property held subject to this trust shall be by

said trustee conveyed and delivered to my surviving child, to be held as his or her absolute property.

"Should my two children, Thomas Ward McManus and Maggie Emma McManus, both die and leave surviving them my said granddaughter, Camilla S. Wolcott, then it is my will that all the property held subject to this trust shall be by said trustee conveyed and delivered to my said granddaughter, to be held by her, as her sole and separate property, and free from the control, rights or liabilities of any husband she may have.

"It is my will that the trustee charged with the execution of this trust shall be required to give adequate bond, and that he shall receive proper compensation for his services in executing said trust."

The will then appoints Thomas Ward McManus executor. A codicil was made, executed and annexed to the will, July 8, 1903, reciting that the daughter of the testatrix, Maggie E. McManus, had died since the execution of the will, and devising all that part of the estate which said daughter would have taken under the will, had she lived, to Thomas Ward McManus and to the granddaughter Camilla S. Burroughs.

The petition sets up the facts above mentioned and alleges that the exact value of the trust estate was unknown to plaintiff, but that its value was approximately two hundred thousand dollars, consisting mainly of real estate from which rentals were derived of considerable value; it sets up the interest of the plaintiff and Camilla S. Burroughs in the trust estate, and alleges that it was the duty of Park, as trustee, to present to the circuit court at least once each year, and at such other times as said court may require a report of the condition of such estate, but that since the appointment of Park as such trustee he had wholly refused to make any report whatever to the circuit court. The petition prays:

"For an order of this court requiring the said Matthew Park, trustee, to file with this court an accounting of the administration of such estate from the time of his appointment; . . . and for an order requir-

ing a trustee to file an annual report of the condition of said estate," etc.

I. The appellant contends that the Act of 1911 should be construed so as to apply only to trust estates created after the enactment of that law; that otherwise it would be unconstitutional, inimical to Section 15, Article II, of the Constitution which provides that no law "retrospective in its operation . . . can be passed by the General Assembly." It is contended that if the Act of 1911 is ambiguous in its terms, one construction of which would render it unconstitutional, and another constitutional, it must be so considered as to make it harmonize with the Constitution. Therefore, in order to avoid declaring it unconstitutional, it should be so construed as to apply only to trusts created and trustees appointed subsequent to the passage of the act.

This argument proceeds upon the theory that if it is made to apply to existing trusts and trustees it is retrospective in operation. Appellant cites cases stating the rule of statutory construction that, unless a different intent in the statute is evident, its provisions are to be considered as prospective only and not retrospective. [State ex rel. v. Wright, 251 Mo. 325, l. c. 344, and cases cited.] This, however, applies only to statutes which would affect vested rights, and not to statutes which are remedial only. No one has a vested interest in the form of procedure; no one has a vested right to have his cause tried by any particular mode. [Schuermann v. Union Cent. Life Ins. Co., 165 Mo. l. c. 652; Roenfeldt v. St. L. & Sub. Ry. Co., 180 Mo. l. c. 564; State v. Taylor, 134 Mo. l. c. 144-145; State ex rel. v. Taylor, 224 Mo. l. c. 464; St. Louis v. Calhoun, 222 Mo. l. c. 52.]

This court said in case of Mainwaring v. Lumber Co., 200 Mo. l. c. 732-733:

"Acts changing remedies in any way that do not destroy or impair vested rights, are excluded from the

rule invalidating retrospective laws, even when they are intended to retroact."

In the case of *State v. Kyle*, 166 Mo. l. c. 305, quoting from *Cooley's Const. Limitations* (2 Ed.), p. 326, it was said:

"Remedies must always be under the control of the Legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose. The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."

The quotation is from a passage in *Cooley on Constitutional Limitations* which has been quoted in several cases by this court. A statute may retroact without being retrospective in the sense that it is inimical to the Constitution. So far as remedies are concerned, it may operate upon property rights and interests which are already vested, but the remedial *action* authorized by the statute of course applies to the future. It has been many times held by this court that a statute is not retrospective in its operation, within the terms of the Constitution, unless it impairs some vested right. [*Smith v. Dirckx*, 223 S. W. 104; *Westerman v. Supreme Lodge K. of P.*, 196 Mo. l. c. 738-739; *Drainage District v. Turney*, 235 Mo. 80, l. c. 92-93; *Abbott v. Mining Company*, 255 Mo. 378, l. c. 384-385; *Kreyling v. O'Reilly*, 97 Mo. App. l. c. 392; *Gibson v. Railroad*, 225 Mo. l. c. 481; *Porter v. Mariner*, 50 Mo. l. c. 367; *Clark v. Railroad*, 219 Mo. 524.]

The case last cited construed an amendment to the Statute of Limitations and said in regard to the claim that it was contrary to Section 15, Article II, of the Constitution, l. c. 532:

“This, because the retrospective laws forbidden by that instrument are laws impairing existing vested civil rights. The law must take away such vested right, or it must create a new obligation, impose a new duty, or attach a new disability in respect to gone-by transactions, in order to be retrospective and under the constitutional ban. There is no vested right in a particular mode of procedure.”

The amplification of the principle in the last sentence of the first paragraph quoted, only particularizes what is meant by existing vested rights. A law which does not impair any vested right is not retrospective in the constitutional sense, although it may change the remedy or provide new remedies for enforcing or defining such a right. The Clark case cites many cases from other jurisdictions illustrating the doctrine. In the Gibson case, *supra*, it was held that a statute giving the administrator of a deceased person, killed by the negligence of a railroad company in another State, the same right to sue in this State as the laws of such other State gave him, merely provided the remedy and was not retrospective so as to prevent recovery, although the death sued for occurred before the act, authorizing the suit, was passed. [225 Mo. l. c. 481.]

In the Abbott Mining Company case, 255 Mo. l. c. 384, this court, Division One said:

“A vested right in the sense in which the term was used in the foregoing quotation is a property interest in the thing itself whether it exist in contract or possession; and it is subject to whatever burden may be imposed by the State for the general welfare; that is to say, for the *enforcement and protection* of the rights of all. Laws providing and regulating remedies for the protection and enforcement of legal rights are peculiarly within this rule.” (Italics ours).

In the case of Drainage District v. Turney, *supra*, this court, in defining a retrospective law, after using the same language used by this court in the Clark case, *supra*, 235 Mo. l. c. 92-93, said:

"It must give to something already done a different effect from that which it had when it transpired. In this case the only ground upon which a retrospective application of this statute is asserted is that it applies to an object already in existence at the time of its enactment. Were this a good objection it would lead to startling results, for it could as well be claimed that no statute could be enacted imposing new duties upon or giving new privileges or rights to a person already born as that these things could not be done by the Legislature with reference to a corporation already created."

Judge Goode in the Kreyling Case, 97 Mo. App. 392, speaking of a certain statute which was claimed to be retrospective in effect, commented thus:

"So it is in a sense, but not in the technical sense which invalidates laws or restricts their operation to future affairs. That statute, of course, affects securities given before it was adopted, and is designed to do so, but it only affects the *remedy* and not the *right*. It deprives no security holder of the vested estate or interest."

The Act of 1911, under the authorities cited, requiring trustees appointed by the court in any trust estate to make an annual report only applies to procedure, is entirely remedial in operation, and affects nobody's existing right. Such trustee has no vested right in the manner of accounting for his trust. The statute may be construed to affect trust estates and trustees created before its passage without being contrary to the section of the Constitution.

II. When, on the death of Crow, the Circuit Court of the City of Saint Louis appointed Park as trustee, an order was entered of record that the court retain jurisdiction of the trustee in all matters connected with the administration of the trust. Subsequently, Park applied to the circuit court for an order to sell a portion of the land held in trust for the purpose of paying certain charges, including taxes, etc., against the estate. The plaintiff here, Thomas Ward McManus, filed in this court a peti-

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tion asking for a writ of prohibition to prevent the circuit court from proceeding in the matter on the ground that it had no jurisdiction. This court issued a preliminary rule in prohibition and on a hearing made the same absolute, on the ground that as the law then stood the circuit court had no jurisdiction of the trust estate; and its order retaining jurisdiction was without authority. [State ex rel. McManus v. Muench, 217 Mo. 124.]

It is evident that the Act of 1911 was intended to remedy that defect; that is, to give the circuit court jurisdiction over trustees which the ruling of this court in that case held it didn't possess. The question to be determined here is whether or not the act shall have the effect intended as applied to existing trusts, or shall be applied only to trusts hereafter created.

The appellant claims as a further reason why the demurrer to the petition should have been sustained, that the *terms* of the Act of 1911 show only that it was intended to apply to trust estates thereafter created, and to trustees thereafter appointed. The argument is that where a statute is ambiguous a doubtful construction should be resolved in favor of its prospective operation. That is true of statutes affecting substantive rights, as has been seen; all doubts must be resolved in favor of its constitutionality. But to the contrary is the rule relating to remedial statutes; where such statutes are ambiguous, or of doubtful application, they are liberally construed in order to effect the purpose of their enactment. To that end doubts will be resolved so as to affect past as well as future transactions. [Clark v. Railroad, 219 Mo. 1. c. 532-533.] This court in that case said, 1. c. 533-534:

"Where a new statute deals with procedure only, prima-facie it applies to all actions—those which have accrued or are pending, and future actions. . . . General words in remedial statutes may be applied to past transactions and pending cases, according to all indications of legislative intent and this may be *greatly influenced by considerations of convenience, reasonableness and justice.*" (Italics in the opinion).

The above passage is quoted by this court from Sutherland on Statutory Construction. The court then quotes from another text-book (Endlich on Interpretation of Statutes) as follows, l. c. 534:

"In this country, the general rule seems to be, in accordance with the English, that statutes pertaining to the remedy, i. e., such as relate to the course and form of proceedings for the enforcement of a right, but do not affect the substance of the judgment pronounced, and neither directly nor indirectly destroy all remedy whatever for the enforcement of the right, are retrospective, so as to apply to causes of action subsisting at the date of their passage." And further quoting from the same author: "It is said that an act dealing with procedure only applies unless the contrary intention is expressed, to all actions falling within its terms whether commenced before or after the enactment."

The ruling in that case has been approved by numerous later decisions of this court. [St. Louis v. Calhoun, 222 Mo. l. c. 52; State ex rel. v. Taylor, 224 Mo. l. c. 464; Gibson v. Railroad, 225 Mo. l. c. 481; Start v. National Newspaper Assn., 222 S. W. l. c. 872.]

The evident purpose of the Act of 1911 was to have the remedy there provided apply to *all* trustees appointed by the court before or afterwards. Such a trustee as is appointed on the failure of the trustee selected by a testator, the trustee between whom and the testator the relation of *personal* trust exists. The court appointed trustee is under no *personal* obligation, but only his official obligation to account to his *cestui que trust*, or to exhibit the state of the property in his charge. Before the act was passed there was no way to compel an accounting from such trustee except upon an allegation of mismanagement, fraud or incompetence. The beneficiary usually could not discover mismanagement in the absence of an accounting. The very purpose of having accounts filed was that the *cestui que trust* might ascertain whether there was fraud or incompetence which would justify action against the trustee.

In order to ascertain the legislative intent the language of the act must be examined. It is as follows:

"TRUSTS AND TRUSTEES: Giving Circuit Court Jurisdiction of Trustees for Estates, When.

"AN ACT giving the *circuit court by which a trustee has been appointed, jurisdiction in all matters pertaining to the administration of that trust, and providing for annual reports of trustees.*

"Section

"1. Court to have jurisdiction, when.

"2. Trustee to make annual reports.

"3. Purpose of act.

"*Be it enacted by the General Assembly of the State of Missouri, as follows:*

"Section 1. *Court to have jurisdiction, when.*—If the circuit court of the county *in which a will disposing of an estate has been proved or recorded, shall for such estate appoint a trustee to succeed another therein, who has become disqualified to act, resigned or died, then that court in the proceedings wherein the appointment was made, shall have jurisdiction over such trustee, trust estate, and the beneficiaries thereof as to all matters relating to the administration of said trust until terminated; and said court upon its own motion, or upon notice and motion by the trustee of any beneficiary thereof, may in its discretion make orders therein necessary to conserve the estate or to cause the same to be properly administered.*

"Sec. 2. *Trustee to make annual reports.*—Every such trustee, appointed as in this act described, shall present to the court, *wherein the appointment was made, a report of the condition of said trust estate at least once each year and at such other times when ordered by the court so to do.*

"Sec. 3. *Purpose of act.*—For purposes of this act, the City of St. Louis shall be considered a county.

"Approved April 11, 1911."

We have put the most significant words in italics.

Two subjects are to be considered: *trustees, and trust estates.*

The title of the act purports to give jurisdiction of a trust estate to the circuit court by which a trustee *has been appointed*; that, of course, would apply to all trust estates created and all trustees appointed by the court, whether before or after the passage of the act. The language of Section 1 of this act gives a circuit court jurisdiction over trust estates "*in which a will disposing of an estate has been approved or recorded.*" The words undoubtedly refer to a will disposing of an estate before as well as after the passage of the act. And further, in regard to the conditions under which the new appointment takes place the act provides for a case where a trustee appointed by the will "*has become disqualified to act, resigned or died.*" That, of course, means where the original trustee appointed by the will has died at any time prior to the appointment of the new trustee, that would mean before as well as after the passage of the act. So, by the clear wording of the statute it is made to apply to all cases where trusts have been created by will and where trustees so appointed have died before the passage of the act as well as afterwards.

The only thing appearing in the body of the act to throw doubt upon its application to *trustees appointed* before the passage of the act are the words, "*shall for such estate appoint a trustee.*" It is claimed the words "shall appoint" show conclusively that it is only *trustees* which are appointed after the passage of the act that can come within the jurisdiction of the court. It would be strange if it were the intention to vest the court with control over *estates* and *trusts* created and in which trustees have already died *before* the passage of the act, but limited the court in that regard only to cases where new trustees have been appointed *afterwards*, excluding a trustee appointed before.

It has been held by this court that where the terms of an act are ambiguous recourse may be had to the title in ascertaining the intention of the Legislature. [Straughan v. Meyers, 268 Mo. l. c. 588.] The intention expressed in the title of this act plainly shows that it is

retroactive in its application. All of the language of Section 1, except the words "shall appoint," indicates the same intent. The evident purpose of the act on account of the state of the law before its passage, the language applying it to trust estates created and for which trustees failed before its enactment, the absence of any reason why it should be made to apply only to subsequently appointed trustees, all indicate that the legislative intent was to cure the trouble pointed out in the case of *State ex rel. v. Muench*, supra.

We think that a construction of the statute under consideration so as to make it apply to trustees appointed as well as trust estates created, before and after the passage of the act, would meet the evident intention of the Legislature, and not do violence to the plain meaning of the language used.

III. It is further claimed that the act is unconstitutional because it is inimical to Article 4, Section 53, of the State Constitution, paragraph 32 of that section, in that it is class legislation. Defendant did not raise the constitutional question in the circuit court. No section of the Constitution is mentioned in the demurrer to the petition, nor in the motion for new trial. The section of the Constitution which is claimed to be violated must be specifically pointed out and pressed upon by the trial court before a party can be heard to urge the constitutional question here.

The appellant, as considered in Paragraph I above, could appropriately urge upon this court a construction of the statute which would make it constitutional, and that is a different matter from questioning the constitutionality of the statute. We could consider the first, but are unable to consider the latter when it was not specifically urged upon the circuit court.

The judgment of the circuit court is affirmed. *Mozley* and *Railey, CC.*, concur.

PER CURIAM.—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

THE STATE v. MINNIE KELLER, Appellant.

Division Two, March 23, 1921.

1. **ABORTION: Gravamen: Intent.** The production of an abortion is not the offense denounced by the statute (Sec. 4458, R. S. 1909), but the intent to produce a miscarriage or abortion, where the act is not a medical necessity. The intent constitutes the gravamen of the offense, and the evidence must establish such unlawful intent.
2. ———: **Intent: Sufficient Evidence: Dying Declaration.** A conviction under the statute declaring that "any person who, with intent to produce or promote a miscarriage or abortion," administers "to a woman (whether actually pregnant or not) any instrument or other method or device to produce miscarriage or abortion," cannot be based upon the dying declaration of the deceased woman alone unless the State also show that she was pregnant when the operation was performed. If there is no evidence to show that the woman was pregnant at the time of the operation, her dying declaration, uncorroborated, is not sufficient (under Sec. 5240, R. S. 1909) to sustain a conviction.

Appeal from St. Louis City Circuit Court.—*Hon. Wilson A. Taylor*, Judge.

REVERSED.

Anthony A. Hochdoerfer for appellant.

(1) The negative averments of the indictment should have been established by the State. The indictment, having changed in express terms, in addition to other negative averments, that the use of instruments upon Mabel Hitz was not necessary to preserve the life of an unborn child then in the womb of Mabel Hitz, nor advised by a duly licensed physician to be necessary for the purpose of preserving the life of an unborn child then in the womb of Mabel Hitz, it became necessary for the State to prove these specific allegations. *State v. Meek*,

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70 Mo. 355; State v. Casto, 231 Mo. 398; State v. Clements, 14 Pac., 410. (2) The motion made by the defendant at the close of the State's case in the nature of a demurrer and again renewed at the close of the whole case, should have been sustained, because Section 5240, Revised Statutes 1909, provides, that, in prosecutions for "manslaughter occasioned by an abortion or miscarriage . . . no conviction shall be based upon a dying declaration . . . unless corroborated as to the fact that an abortion or miscarriage had taken place." Outside of the dying declaration there was no corroborating evidence as to the fact that an "abortion or miscarriage had taken place," or the connection of the defendant therewith. The conviction herein is based upon the dying declaration admitted in evidence. (3) The court should have instructed the jury in an appropriate instruction that no conviction could be based upon a dying declaration, "unless corroborated as to the fact that an abortion or miscarriage had taken place." Secs. 5231, 5240, R. S. 1909.

Frank W. McAllister, Attorney-General, and *George V. Berry*, Assistant Attorney-General, for respondent.

(1) The State proved every element of the crime and every averment in the indictment including the negative ones. State v. De Groat, 259 Mo. 380; State v. Sonner, 253 Mo. 446; State v. Dargatz, 244 Mo. 225; State v. Casto, 231 Mo. 408; State v. Meek, 70 Mo. 358; State v. Hawkins, 210 S. W. 7. (2) The dying declaration of the prosecutrix was fully corroborated. Sec. 5240, R. S. 1909; State v. De Groat, 259 Mo. 372; State v. Aitken, 240 Mo. 262; State v. Casto, 231 Mo. 409; State v. Hawkins, 210 S. W. 7. (3) Instruction No. 2 was not erroneous. The trial court had first passed upon the admissibility of the dying declaration. State v. Zorn, 202 Mo. 34; State v. Johnson, 118 Mo. 504; Thurston v. Fritz, 91 Kan. 470; State v. Hendricks, 172 Mo. 670; State v. McCannon, 51 Mo. 162; State v. Crone, 209 Mo. 326. (4) Appellant did not ask for an instruction requiring the

dying declaration to be corroborated by proof of an abortion, nor did she save the point. Sec. 5240, R. S. 1909; State v. Lewis, 273 Mo. 532; State v. McBrien, 265 Mo. 604; State v. Hendricks, 172 Mo. 670; State v. Reed, 137 Mo. 128; State v. Rowe, 196 Mo. 9; State v. Othick, 184 Mo. 108. (5) The indictment is sufficient. It is definite and certain, follows the language of the statute and fully informs the defendant of the offense with which she is charged. Sec. 4458, R. S. 1909; Kelley's Crim. Law and Prac., sec. 493; State v. Hawkins, 210 S. W. 6; State v. Gow, 235 Mo. 314; State v. Casto, 231 Mo. 402; State v. Dargatz, 244 Mo. 225; State v. Harroun, 199 Mo. 525; State v. Mills, 146 Mo. 206.

RAILEY, C.—On June 1, 1918, the grand jury of the City of St. Louis, Missouri, returned into the circuit court of said city an indictment against defendant, charging her with having performed an unlawful operation on Mabel Hitz in the city aforesaid, on April 20, 1918 with the felonious intent of producing an abortion or miscarriage, from the effects of which said Mabel Hitz died on April 28, 1918.

Defendant, on March 24, 1919, was formally arraigned in open court, waived the reading of said indictment and entered a plea of not guilty.

On March 25, 1919, the jury before whom said cause was tried, returned into court the following verdict:

"We, the jury in the above entitled cause, find the defendant guilty of manslaughter in the second degree as charged in the indictment, and assess the punishment at imprisonment in the penitentiary for three years."

Defendant, in due time, filed motions for a new trial and in arrest of judgment. Both motions were overruled. After sentence and judgment, she appealed the cause to this court.

The evidence, and such other matters as we may deem important, will be considered later.

I. The indictment is based upon Section 4458, Revised Statutes 1909, and its sufficiency is challenged.

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We are of the opinion that appellant's contention, in respect to said matter, is devoid of merit. The indictment, as framed, meets with the substantial requirements of said statute as construed in *State v. Hawkins*, 210 S. W. (Mo.) 1. c. 6, and *State ex. rel. v. Shields*, 230 Mo. 1. c. 100, and following.

Indictment. II. It is contended by appellant that the trial court committed error in overruling her demurrer to the evidence at the conclusion of the whole case. In passing upon this question, it will be necessary to consider the provisions of the statute under which this proceeding was commenced, the subject-matter of the indictment, and the evidence produced at the trial.

Insufficient Evidence. Section 4458, Revised Statutes 1909, reads as follows:

"Any person who, with *intent* to produce or promote a miscarriage or abortion, . . . administers to a woman (*whether actually pregnant or not*), . . . any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall, in event of the death of said woman, or any quick child whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter in the second degree and punished accordingly." (Italics ours).

Second 4469, Revised Statutes 1909, provides that the punishment for manslaughter in the second degree is by imprisonment in the penitentiary not less than three nor more than five years.

The indictment herein does not charge that, on April 20th, 1918, Mabel Hitz was pregnant, and that defendant operated on her to produce an abortion or miscarriage, but she is charged with having performed an unlawful

operation on said date, with the felonious intent of producing an abortion or miscarriage. It is not a crime to produce an abortion or miscarriage, provided the operation is authorized by Section 4458, *supra*.

In construing said Section, BURGESS, J., in the well considered case of *State ex rel. v. Shields*, 230 Mo. 1. c. 103, said:

“The production of abortion is not the offense denounced by the Statute, but the intent to produce a miscarriage or abortion, by administering drugs, using instruments, etc., where the act is not a medical necessity. The intent constitutes the gravamen of the offense, and the failure of the attempt has no bearing whatever upon the guilt of the defendant, as the actual production of a miscarriage is unnecessary to the completion of the offense.”

Keeping in mind the provisions of the law aforesaid, and the averments of the indictment, was the evidence adduced at the trial sufficient to warrant the conviction of defendant? In order to determine this question, we will proceed by process of elimination. After a very careful reading of the record and leaving out of consideration, for the present, the dying declarations of Mabel Hitz, we find no substantial evidence tending to show that, on April 20, 1918, or at any other time, Mrs. Hitz was actually pregnant, nor does the evidence, without the dying declarations, tend to show, that defendant performed, or attempted to perform on her, any kind of an operation.

Passing, for the purposes of the case, the objections urged against the competency and legal effect of the dying declarations, is the verdict of the jury supported by substantial evidence, and can it stand the test of judicial criticism?

Section 5240, Revised Statutes 1909, which authorizes dying declarations of this character to be read in evidence, provides that, in prosecution for abortion or miscarriage, “no conviction shall be based alone upon such declarations unless corroborated as to the fact that an abortion or miscarriage has taken place.” Bouvier de-

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finer abortion as "the expulsion of the foetus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life." In 1 Cyc. 170, abortion is defined as, "the delivery or expulsion of the human foetus prematurely, or before it is yet capable of sustaining life." In 1 Ruling Case Law, Section 9, pages 74-5, it is said: "The rule upheld by the weight of authority in the United States is that, in the absence of statute, to render criminal the procurement of a miscarriage the woman whom the accused causes to miscarry must be quick with child." In order to sustain a conviction based alone upon the dying declarations of Mrs. Hitz, it was necessary for the State to show that she was pregnant when the alleged operation was performed. As there is nothing in the record tending to show, that Mabel Hitz was pregnant in April, 1918, her dying declarations, uncorroborated as aforesaid, were insufficient to sustain a conviction in this case. In other words, before a conviction can be upheld, based alone upon said dying declarations, it must appear that Mabel Hitz was pregnant in April, 1918, and that an abortion or miscarriage was then produced by defendant as alleged in the indictment. The evidence submitted at the trial, did not warrant the jury in finding defendant guilty of the crime charged against her.

III. Other matters have been presented by counsel in their respective briefs, but in view of the conclusions heretofore reached, it becomes unnecessary to consider same. On the record before us, the defendant was improperly convicted.

As all the witnesses who might be expected to throw any light on the transactions before us were examined at the trial, we do not deem it advisable to remand the cause. We accordingly reverse the case and discharge the defendant. *White, C.*, concurs; *Mozley, C.*, dissents.

PER CURIAM:—The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All of the Judges concur.

BENNET CLARK HYDE, Appellant, v. IDA H. NELSON et al.**Division Two, March 23, 1921.**

1. **LIMITATIONS: Effect of Imprisonment and Bail.** Under the statute (Sec. 1323, R. S. 1919) declaring that "if any person entitled to bring an action in this article specified, at the time the cause of action accrued be imprisoned on a criminal charge, or in execution under a sentence of a criminal court for less than his natural life, such person shall be at liberty to bring such actions within the respective times in this article limited after such disability is removed," an action for libel brought by a person who is neither imprisoned nor physically restrained during the pendency of a prosecution against him for murder is barred by limitations if not brought within two years after the libel was published.
2. ———: ———: **Bail.** The giving of bail by a defendant in a murder charge does not stop the running of the Statute of Limitations against his civil action for libel. That "the principal is supposed to be in the bail's constant custody" is a legal fiction, and does not amount to imprisonment or physical restraint. The purpose of admitting an accused to bail is to relieve him of imprisonment, and in spite of it he is at liberty until his sureties surrender him.
3. ———: ———: ———: **Habeas Corpus.** One who has been admitted to bail is not entitled to the writ of *habeas corpus* for the purpose of obtaining his discharge. A prisoner released on bail is at liberty, and one at liberty is not imprisoned. The fact that a defendant in a murder charge gave sufficient bail and thereafter, being wrongfully committed to jail, was discharged on *habeas corpus*, did not amount to imprisonment or prevent him from bringing his civil action for libel.
4. **LIBEL: Survival.** Under the statutes, if the libeler dies before suit is brought, no action for libel can be maintained against his devisees or executor or administrator.

Appeal from Jackson Circuit Court.—*Hon. Willard P. Hall*, Judge.

AFFIRMED.

H. S. Julian for appellant.

(1) Under Sec. 5438, R. S. 1909, appellant's cause of action survived the death of William R. Nelson and the suit was properly brought against Mrs. Nelson and Mrs. Kirkwood, individually and as trustees, as being the legal representatives of William R. Nelson. *Knole v. Paxton*, 268 Mo. 463; *Shippey v. Kansas City*, 254 Mo. 23; *Winter v. Van Blarcom*, 258 Mo. 419; *Taylor v. Met. Ry. Co.*, 256 Mo. 218; *Ryan v. Ortgier*, 201 Mo. App. 1. (2) The court erred in holding that the Statute of Limitations began to run from May 11, 1910, the time of the publication of the article, instead of from April 9, 1917, at the time he was discharged under the indictments and released from imprisonment by his bondsmen. *State v. Hyde*, 234 Mo. 259; 6 Mod. 231, 339; *Republica v. Jailor*, 2 Yates (Penn.) 265; *Comm. v. Brickett*, 8 Pick. (Mass.) 140; *Wharton's Crim. Law and Proc.* sec. 62; *Devine v. State*, 5 Sneed (Tenn.) 626; *State v. Maken*, 3 Harr. (Del.) 569; *Ponder v. Cox*, 26 Ga. 491; *Matilda v. Crenshaw*, 12 Tenn. (4 Yerger) 299; *Price v. Slaughter*, 1 Cinn. Rep. 429; *Taylor v. Taintor*, 83 U. S. (16 Wall.) 371; *Pickett v. Rush*, 4 Adol. and Ell. 912; *Chandler v. Villett*, 2 Saunders, 117; *In re James*, 18 Fed. 853; *United States v. Stevens*, 19 Fed. 101; *Lassater v. Wait*, 67 S. W. 518; *Wood on Lim.* (4 Ed.) sec. 241; 19 Am. & Eng. Ency. Law (2 Ed.), 237; 25 Cyc. 1264; *State v. Calhoun*, 50 Kan. 523; 18 L. R. A. 838.

Watson, Gage & Ess for respondents.

(1) The alleged cause of action asserted in plaintiff's petition was barred by the Statute of Limitation for the reason that the appellant was not imprisoned within the meaning of Sec. 1894, R. S. 1909. *City of Warrensburg v. Simpson*, 22 Mo. App. 699; *Furlong v. Association*, 189 S. W. (Mo.) 385; 5 Cyc. 10; 21 Cyc. 1742; 17 C. J. 441; Sec. 4391, R. S. 1909; *Bird v. Jones*, 7 Q. B. 742; *Black's Law Dictionary*; *Ex parte Jones*, 41 Cal. 209;

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In re Morse, 117 Fed. 763; People ex rel v. Grant, 111 N. Y. 587; Miller v. Strabbing, 92 Mich. 302; Klasner v. Klasner, 170 Pac. 745; 2 Kent. Com. 26; Rich v. Bailey, 123 Ky. 897, 97 S. W. 747; Wales v. Whitney, 114 U. S. 570; Sibray v. United States, 189 Fed. 404, 107 C. C. A. 483; In re Dykes, 13 Okla. 339, 74 Pac. 506; Piggett v. Rush, 4 Adolf & Ell. 912; Matilda v. Cranshaw, 4 Yerg. (Tenn.) 299; Ramsey v. Colbaugh, 13 Iowa, 164; Garrett v. Georgia, 102 Ga. 558; Wilkes v. Slaughter, 10 N. C. 211; Spring v. Dahlman 34 Neb. 692; Alexander Wass v. Bartlett, 10 Gray (Mass.) 490; State v. Calhoun, 50 Kan. 523, 22 Pac. 38; L. R. A. 838; Lawson v. Buzines, 3 Harr. (Del.) 416; Johnson v. Bouton, 35 Neb. 398; Floyd v. State, 12 Ark. 43; 16 Am. & Eng. Ency. Law (2 Ed.), 49. Ex parte Cain, 20 Okla. 125, 93 Pac. 176; Secs. 2478, 2442, 2444 to 2448, 2456, 2448, 2467, 2468, 2471, 2472, 2474, 2477, 2483 and 1891, R. S. 1909. (2) Inasmuch as William R. Nelson died in April, 1915, and no suit had theretofore been instituted against his administrators or executors, no cause of action survives in favor of appellant against respondents, as trustees of his estate. Secs. 106, 5438, R. S. 1909.

HIGBEE, P. J.—This is an appeal from the judgment of the circuit court sustaining a demurrer to plaintiff's amended petition. Plaintiff filed his petition on April 8, 1919, and on June 10, 1919, filed an amended petition. In substance it avers that William R. Nelson was owner and publisher of the "Kansas City Star," a daily newspaper; that Stout was managing editor and Seested was general manager of said newspaper; that Nelson died in April, 1915, testate, devising his property to his wife, Ida H. Nelson, and to his daughter, Laura Nelson Kirkwood; that his will was probated; that plaintiff is a physician and surgeon in Kansas City; that said William R. Nelson and the defendant Stout and Seested, wickedly and maliciously intending to injure plaintiff and to cause it to be suspected that he was guilty of murdering Thomas H. Swope and Chrisman Swope by

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poisoning them and that he tried to murder the family of Mrs. L. O. Swope by inoculating them with the germs of typhoid fever so that they would die, did, on or about May 11, 1910, publish in the "Kansas City Star" the following false, scandalous, malicious and defamatory article, to-wit:

"They said, now, Dr. Twyman, you may talk all you please, you are not going to convince us at all for we believe we know that Dr. Hyde (meaning this plaintiff) is responsible for the death of Colonel Swope, Chrisman Swope, and the inoculation of this family with typhoid," meaning thereby, etc., that on March 5, 1910, the grand jury of Jackson County returned an indictment charging plaintiff with the murder of Thomas H. Swope, under which he was arrested; that he was admitted to bail March 8, 1910, plaintiff, as principal, and certain sureties signing a bond in the sum of \$50,000 under which he remained at large until April 27, 1910, when he was remanded to jail by the court; that on May 16, 1910, he was found guilty of murder in the first degree by a jury and sentenced to imprisonment for life in the penitentiary, which judgment was reversed April 11, 1911, and the cause was remanded for new trial; that he was admitted to bail on April 26, 1911, on a writ of *habeas corpus* issued by the circuit court and executed a bond for his appearance signed by himself as principal and certain others as sureties, and that he was continuously under said bond until April 9, 1917, when all indictments pending against him were dismissed. Plaintiff laid his damages, actual and punitive, at \$2,500,000.

The defendant demurred, because (1) the petition does not state facts sufficient to constitute a cause of action: (2) the cause of action abated on the death of William R. Nelson: (3) no suit has been brought against the administrator of William R. Nelson, deceased. (4) the action is barred by the Statute of Limitations and plaintiff was not imprisoned within the meaning of Section 1894, Revised Statutes 1909 (now Sec. 1323, R. S. 1919). The demurrer was sustained. Plaintiff

declining to plead over, the court dismissed the action and rendered judgment against him for costs.

I. The learned counsel for appellant, in framing the amended petition, obeyed the mandate of our statute requiring the petition to contain "a plain and concise statement of the facts constituting a cause of action." The libel was published on May 11, 1910. The action was brought April 8, 1919, nearly nine years after the publication and was therefore barred by the two-year statute unless the facts stated in the petition show that the plaintiff was under the disability of imprisonment on a criminal charge until April 9, 1917. Section 1323 reads:

"If any person entitled to bring an action in this article specified, at the time the cause of action accrued be either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution under a sentence of a criminal court for a less term than for his natural life, or a married woman, such persons shall be at liberty to bring such actions within the respective times in this article limited after such disability is removed."

Appellant urges that he was under duress and in the custody of the law and was imprisoned on a criminal charge while out on bail within the meaning of this section, and was entitled to bring his action within two years after the criminal proceedings were dismissed on April 9, 1917. To illustrate his plight appellant, in substance, says he would not have been able to enforce any of his rights that were strongly resisted against contesting litigants in a court of justice. With eight indictments still pending and the hangman's noose dangling about his ears, he would have been impotent to assert his rights. This moving, graphic picture is not suggestive of the disability of duress, but rather of the expediency of a change of venue.

The reason for the enactment of the statute quoted is obvious. One actually imprisoned or physically re-

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strained is deprived of freedom of action. He cannot look after his affairs. It would be a denial of the equal protection of the law if one so restrained were not exempted from the operation of the general Statute of Limitations. The reason of the law is the life of the law.

Physical
Restraint:
Bail.

There can be no doubt that the word *imprisonment* is used in this section in its plain, ordinary meaning. Imprisonment is, "The act of putting or confining a man in prison; the restraint of a man's personal liberty; coercion exercised upon a person to prevent the free exercise of his powers of locomotion." [21 Cyc. 1742.]

Appellant relies upon remarks made by Judge FERRISS in *State v. Hyde*, 234 Mo. 200, Dr. Hyde, as stated in the petition, at the time of his indictment had given a continuing bond in the sum of \$50,000, had gone to trial at the next term, and had given no indication of any purpose to abscond. At the close of the evidence for the State, the court, of its own motion, revoked his bail bond and committed him to jail on the ground "that the evidence so far given amounts to a presumption that under the law deprives defendant of the right to go on bond." This action was held to be an abuse of the court's discretion and prejudicial to the interests of the defendant. To illustrate the lack of need for the court's action, Judge FERRISS, in speaking of the condition of the bond, at page 258, said:

"In a sense, the effect of the bail bond was to place the defendant in the custody of his bondsmen, but he was *in custodia legis*. 'A man's bail are looked upon as his gaolers of his own choosing, and the person bailed is, in the eye of the law, for many purposes esteemed to be as much in the prison of the court by which he is bailed as if he were in the actual custody of the proper gaoler.' [2 Hawkins, Pleas of the Crown, p. 140.] It is said in 1 Hale, 325: 'Yet the law is all one if he be under bail, for he is *in custodia* still, for the bail are, in law, his keepers.' Wharton, in his work on Criminal Pleading and Practice, says: 'The principal is supposed to be in

the bail's constant custody, and the latter being the former's jailor, may at any time surrender him to the custody of the law.' [Sec. 62.] . . . The power to surrender his principal to the court at any time is given to the surety by our statutes, Section 5230, Revised Statutes 1909. The recognizance is not a contract by which the defendant secures an unrestricted right to be at large; nor does it deprive the court of its inherent right to deal with the person of the prisoner."

In *United States v. Lee*, 170 Fed. 613, 614, it was said:

"In the theory of the law, by a recognizance of bail in a criminal action, the accused is committed to the custody of the sureties as to jailers of his own choosing, and is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, and are bound, at their peril, to see that he obeys the court's order."

The purpose of admitting to bail is to relieve the accused of imprisonment. [*People v. Mead*, 92 N. Y. 415.] That Dr. Hyde was in the custody of his bondsmen is a legal fiction. He was only constructively so, because by the statute (Section 3923) a surety, when he desires, may procure a copy of the recognizance from the clerk, by virtue of which the bail may take the principal in any county in this State. It is in this sense that the law says the principal is in the custody of his bondsmen. The statute defines their control over him. He is constructively in their control at all times but he is at liberty until they actually take him into their custody.

In *re Bauer*, 112 Mo. 231, 234, Judge GANTT said:

"It is the duty of this and all other courts to construe these sections of the statute in a humane spirit, and our conclusion is that, when the circuit court admitted the petitioner to bail and approved his bond, he was entitled to go at liberty, notwithstanding there was no other order staying the judgment against him." And on page 235:

"The learned counsel concedes that at common law the sureties on bail bond might surrender their principal at any time. It has been quaintly said that 'bail have their principal always upon a string, and may pull the string whenever they please and render him in their own discharge.' [Anonymous, 6 Modern, 231; Toles v. Adey, 84 N. Y. 240.] The sureties are frequently called the principal's jailers, 'for he is only at liberty by the permission and indulgence of the bail; they may take him up at any time.' [Lord HARDWICKE in Ex parte Gibbons, 1 Atk. 237.]"

II. Dr Hyde was released from imprisonment and admitted to bail on a writ of *habeas corpus*. It is pertinent therefore to consider what constitutes imprisonment in such proceedings.

The act provides that every person unlawfully committed, detained, confined or restrained of his liberty may prosecute a writ of *habeas corpus*. [Section 1876.]

It is uniformly held that the writ will not lie where one is at large on bail bond. It was held in the learned opinion of WALKER, C. J., in State ex rel. v. Wurdeman, 254 Mo. 561, l. c. 572:

"The test, therefore, as to the right to this writ is the existence of such an imprisonment or detention, actual though it may not be, as deprives one of the privilege of going when and where he pleases (Hurd on Hab. Corp., pp 200 et seq.); and upon such restraint being alleged, the court or judge will, in the exercise of discretion, determine whether the individual liberty of the petitioner and the demands of justice, if the petitioner is being held under the warrant or process of a court, authorize the issuance of the writ."

It is said that the writ of *habeas corpus* is intended for the benefit of all persons who may be deprived of their liberty without sufficient cause. An actual restraint is necessary to warrant interference by *habeas corpus*; but any restraint which precludes freedom of action is sufficient, and actual confinement in jail is not necessary.

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Persons discharged on bail are not restrained of their liberty so as to be entitled to discharge on *habeas corpus*, but upon their surrender to the proper officers by their sureties it has been held that *habeas corpus* will lie. So, if a person who has been released on bail surrenders himself of his own accord, it is held in several jurisdictions that *habeas corpus* will not lie. [21 Cyc. 288-290, where many cases are cited in the notes.]

In *Johnson v. Hoy*, 227 U. S. 245, 33 S. C. 240, Mr. Justice LAMAR, at page 247, said:

"But even if it could be claimed that the facts relied on presented any reason for allowing him a hearing on the constitutionality of the act at this time, the defendant would not be entitled to the benefit of the writ, because since the appeal, he has given bond in the district court, and has been released from arrest under the warrant issued on the indictment. He is no longer in the custody of the marshal to whom the writ is addressed, and from whose custody he seeks to be discharged. The defendant is now at liberty, and having secured the very relief which the writ of *habeas corpus* was intended to afford to those held under warrants issued on indictments, the appeal must be dismissed."

See opinion by Justice MILLER in *Wales v. Whitney*, 114 U. S. 564, where the question is thoroughly examined. The sum of the matter is that a prisoner released on bail is at liberty and that one at liberty is not imprisoned.

III. Appellant also insists that under Section 5438, Revised Statutes 1909 (now Sec. 4231, R. S. 1919), his cause of action survived the death of William R. Nelson and the action was properly brought against his widow and daughter, the devisees in his will. The difficulty with the plaintiff's case is that Section 4231, Revised Statutes 1919, has no application. It provides that "causes of action upon which suit has been brought by the injured party for personal injuries other than those resulting in death, whether such injuries be to the health or to the person of the injured party, shall not

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abate by reason of his death, nor by reason of the death of the persons against whom such cause of action shall have accrued." The case is controlled by Section 97 and 98, Revised Statutes 1919. Section 97 reads:

"For all wrongs done to property, rights or interest of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer, and, after his death, against his executor or administrator, in the same manner and with like effect, in all respects, as actions founded upon contract."

Section 98 reads:

"The preceding section shall not extend to actions for slander, libel, assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator."

It is thus seen that the action for libel as against William R. Nelson did not survive his death. Section 4231 and the cases cited by appellant have reference to actions for personal injuries, and are not in point.

The judgment is affirmed. All concur.

Ex Parte DICK & BROTHERS QUINCY BREWERY COMPANY, Petitioner, v. JAMES ELLISON et al.,
Judges of Kansas City Court of Appeals.

In Banc, April 1, 1921.

1. **CERTIORARI: Conflict in Opinions: Facts Outside of Record.** In a *certiorari* to a court of appeals, wherein it is asserted by relator that said court's ruling that the evidence was sufficient to submit the case to the jury contravened prior decisions of the Supreme Court, evidence which does not appear in the opinion of the court of appeals cannot be considered.
2. ———: ———: **Other Decisions of Court of Appeals.** On *certiorari* to a court of appeals, conflict of its opinion with other decisions of courts of appeals cannot be made the basis of quashing said opinion.

3. ———: ———: **Agency: Presumption Arising from Ownership: Question for Jury.** Where a plaintiff was injured by an auto-truck in use for the delivery of beer and soda water, and there was no question that the driver was in the course of employment, and the real question at issue was whether the relationship of agency or master and servant existed between the driver and a brewery-company, and the Court of Appeals in its opinion says the evidence tended to show that a certain firm was conducting the business of distributing beer on commission, and hired the driver in that business; that the truck was owned by the brewery company; that it had been substituted by it for horse-drawn trucks; that it caused its own name to be printed upon it; that no charge was made against the firm for its use; that repair bills were paid by the brewery company; that it paid the rent on the building occupied by the firm, and maintained at its own expense the refrigerating plant for cooling beer; that it fixed the sale price of beer; that containers, when empty, were returned to the company at its expense; that the firm acted for it in collecting notes and rents and buying saloon buildings for the company; that the company carried insurance on the truck and had previously settled a claim for damages arising out of an accident in which the truck had a part, and then rules that such evidence was sufficient to carry the case to the jury on the question whether the driver was the agent of the brewery company in delivering the beer, and further rules that said issue does not rest upon any mere presumptions arising out of the ownership of the truck, but upon direct testimony concerning the relations between the company and the firm, and also upon inferences of fact which the jury were entitled to draw from the evidence, its said rulings do not conflict with prior decisions of the Supreme Court.
4. ———: ———: **Instruction: Covering Whole Case.** It will not be ruled that the Court of Appeals violated previous rulings of the Supreme Court in holding that the instruction given for plaintiff which undertook to cover the whole case contained every necessary element entitling plaintiff to recover against relator, including a requirement for a finding of the existence of such a relation between a firm and the truck driver who negligently caused the injury, on the one hand, and relator on the other, as to render relator liable for the driver's negligence, where an examination of the instruction itself shows that it did in express words include such requirement and all other necessary elements.
5. ———: ———: **Evidence: Personal Injuries; Members of Family: General Objection: Repetition.** It is settled law in this State, and has been since *Dayharsh v. Railroad*, 103 Mo. 1. c. 577, that, in an action for damages for personal injuries negligently inflicted,

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it is error to admit, over proper and timely objection, evidence of the number of plaintiff's children and who compose his family; and while the Court of Appeals so held, its ruling that a general objection was insufficient to save the point was error, and conflicts with prior decisions of the Supreme Court, in view of the fact that the evidence was incompetent for any purpose, and a general objection to it was timely made, and the general objection held inadequate by the Court of Appeals was made, not to a new question, but to a repetition of the question after the trial court had ruled the evidence admissible.

6. **EVIDENCE: General Objection: Exception.** An exception exists to the rule that a general objection that certain evidence is irrelevant, incompetent and immaterial is too broad and sometimes constitutes no objection at all. It is that if the evidence objected to is not competent for any purpose a specific objection has no office and a general objection is sufficient.
7. ———: ———: **Repetition.** Once an objection has been seasonably made and overruled and exception saved, it is not necessary, in order to save the point, to continue to repeat the objection to the same testimony. On the contrary, persistence in a running fire of the same objection to the same testimony might become indecorous and disrespectful.
8. ———: ———: **Materiality Not Foreseen.** The admission of incompetent testimony cannot be excused on the theory that at the opening of the trial the court cannot know that the testimony objected to may not prove competent in some way at later stages of the proceeding. If this were a true theory, then any evidence wholly incompetent can be admitted without error, since it is open to scarcely any other than a general objection, and no general objection would be good at the beginning of the trial.
9. ———: **Responsive Answer: Shown by Subsequent Testimony.** The answer "ten children" is responsive to the question, "Who compose your family?" and it is not shown to be irresponsible by subsequent testimony showing it to be in part untrue.
10. ———: **Objections: Made by One of Several Defendants.** When one of several defendants makes an objection to the admission of testimony it is unnecessary for the others to repeat it in order to put themselves in position to base an assignment of error upon it on appeal.
11. ———: ———: ———: **Motion for New Trial.** Likewise, one of a group of defendants may, in his motion for a new trial, adopt an objection made by another defendant to a ruling of the trial court in admitting evidence and base an assignment of error thereon.

Certiorari.

RECORD QUASHED.

Culver & Phillip, John S. Boyer, William B. Bostian, and R. R. Brewster for relator.

(1) The trial court erred in refusing to give the peremptory instruction asked by the defendant at the close of plaintiff's case, and, again, at the conclusion of all the testimony, and the decision of the Court of Appeals affirming its ruling in that regard is at variance with the latest controlling decisions of this court. Any presumption that might have arisen from the ownership of the truck in question and from other facts and circumstances was swept aside and destroyed by the direct and positive testimony introduced by plaintiff himself. *Hays v. Hogan*, 273 Mo. 1; *Guthrie v. Holmes*, 272 Mo. 215; *Bollman v. Bullene*, 200 S. W. 1068; *Mockowik v. Railroad*, 196 Mo. 571; *Glassman v. Harry*, 182 Mo. App. 308; *Spellman v. Delano*, 177 Mo. App. 33; *Allen v. Coglizer*, 208 S. W. 102. (2) Plaintiff's instruction number two, which purported to cover the whole case was erroneous and prejudicial in that it lacks the essential elements of liability, and the decision of the Court of Appeals upholding this instruction is in direct conflict with the following latest controlling decisions of this court: *State ex rel. v. Ellison*, 272 Mo. 583; *Wojtylak Coal Co.*, 188 Mo. 283; *Hall v. Coal Co.*; 260 Mo. 367; *Walker v. White*, 193 Mo. App. 18; *Traylor v. White*, 185 Mo. App. 331; *Humphries v. Railway*, 191 Mo. App. 721; *Pearson v. Lafferty*, 193 S. W. 43; *Kerr v. Bush*, 198 Mo. App. 617; *Dalrymple by Guardian v. Motor Co.*, 135 Pac. 91, 48 L. R. A. (N. S.) 424; *Standard Oil Co. v. Anderson*, 212 U. S. 215; *Wyllie v. Palmer*, 137 N. Y. 248, 19 L. R. A. 285. (3) The errors and omissions contained and made in plaintiff's instruction number two cannot be corrected and supplied by other instructions, inasmuch as plaintiff's instruction number two purports to cover the whole case.

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Walker v. White, 192 Mo. App. 18; State ex rel. v. Ellison, 272 Mo. 583; Humphries v. Railway, 191 Mo. App. 721; Hall v. Coal Co., 260 Mo. 367. (4) The trial court committed error in permitting plaintiff to testify as to the number of his children and the ruling of the Court of Appeals upon this point is in direct conflict with the following latest controlling decisions of this court: Hecke v. Dunham, 192 S. W. 120; Dayharsh v. Railway, 103 Mo. 570, 23 Am. St. 900; Williams v. Railway, 123 Mo. 573; Mahaney v. Railway, 108 Mo. 191; Stephens v. Railway, 96 Mo. 207. (5) Where appellant has once squarely objected to the introduction of certain evidence, it is not necessary that he follow it up with repeated objections on the same point. Bailey v. Kansas City, 189 Mo. 512; Wabash Ry. Co. v. Cockrell, 192 S. W. 446; Schierbaum v. Schemme, 157 Mo. 1; Gold v. Jewelry Co., 165 Mo. App. 154, Reynolds v. Publisher, 155 Mo. App. 612.

Duvall & Boyd for respondents.

(1) This court will not, under its rules governing applications for writ of *certiorari*, notice petitioner's charge that "the demurrer to plaintiff's evidence should have been sustained by the trial court." State ex rel. Scullin v. Robertson, 187 S. W. 34; State ex rel. Dunham v. Ellison, 213 S. W. 459. (a) This court, for the facts in the case, will go only to the opinion of the Court of Appeals, and will not review the record to determine whether or not a demurrer should have been sustained. State ex rel. Dunham v. Ellison, 213 S. W. 459; State ex rel. Wahl v. Reynolds, 272 Mo. 588; State ex rel. Commonwealth Trust Co. v. Reynolds, 213 S. W. 804; State ex rel. Const. Co. v. Reynolds, 214 S. W. 369. (b) The Court of Appeals found that "there was ample evidence from which the jury could find that the delivery of beer, in which the truck was engaged at the time of the injury, was the business of the brewery company," and that point is not before this court. The cases of Hays v. Hogan, 273 Mo. 1, Guthrie v. Holmes, 272 Mo. 215, and Bolman v. Bul-

lene, 200 S. W. 1068, cited by relator, and other similar cases cited by it, are not controlling in this case. As pointed out by the Court of Appeals in its opinion, there was proof of abundance of facts from which the jury could infer that the driver of the truck, although employed by Davis & Sons, was in fact the servant of appellant, Dick & Bros. Lockwood v. Am. Exp. Co., 76 N. H. 530; Epstein v. Ruppert, 29 Md. 432; Sandifer v. Lynn, 52 Mo. App. 553; Diel v. Henry Zeltner Brewing Co., 51 N. Y. Supp. 930; Williams v. National Cash Register Co., 157 Ky. 164; Usher v. Tel. Co., 122 Mo. App. 98; Banks v. Southern Exp. Co., 53 S. E. 156. (2) Plaintiff's instruction number two, which submitted the issuable facts, was correct. Counsel for petitioner complained that it did not require the jury to find that "the driver of the truck, at the time and place in question, was the agent, servant or employee of the petitioner," and is therefore erroneous. The instruction did better than that. It required the jury to find facts, which, if true, constituted him the agent of petitioner. (3) The Kansas City Court of Appeals correctly ruled against relator the contention that the trial court committed error in allowing the plaintiff to answer the question "who compose your family?" No objection was made to that question by anybody. The question was asked and answered at the outset of plaintiff's testimony and at the beginning of the trial. The question "Who are the members of your family?" was asked by counsel who represented Davis & Sons but who did not represent the brewery company said: "We object to it as being incompetent, irrelevant and immaterial." That question was not answered and the one now complained of was then asked and answered without any objection by any one. Even if it could be said that the questions were the same, but they were not, the objection made by counsel for Davis & Sons amounted in law to no objection. Fuller v. Robinson, 230 Mo. 22; Stevens v. Knights etc., 153 Mo. App. 196; Renfrew v. Goodfellow, 162 Mo. App. 333. (b) Such an objection would not be good unless the evidence elicited self-evidently could serve no purpose in the case. Surely it cannot be said that at

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the very beginning of the trial, the trial court should have known that the evidence elicited by the question was absolutely immaterial and would serve no purpose whatever in the trial of the case. How could the trial court know at that stage of the case but that the members of his family would be introduced to describe plaintiff's injuries and sufferings, or for some other material purpose? (c) But no objection was made by anyone to the question which was answered; nor was any motion made to strike out the answer. Nor was the point preserved in relator's motion for a new trial. The only complaint made by the relator in its motion for a new trial as to the admission of evidence was in these words: "The court erred in admitting over the objection of this defendant, incompetent, irrelevant and immaterial evidence offered by the plaintiff." (4) Relator has not shown and cannot show that in the opinion and judgment of the Court of Appeals in the case of Vaughn v. Davis et al., it announced any general principle of law contrary to the latest announcement of this court upon the subject, or, on a given state of facts, announced and applied any conclusion of law contrary to a conclusion of this court on a similar state of facts, and the writ of *certiorari* should not have issued in this case. State ex rel. Peters v. Reynolds, 214 S. W. 122.

JAMES T. BLAIR, J.—*Certiorari*. The record brought here by the writ is that of the Kansas City Court of Appeals in Vaughn v. Wm. F. Davis & Sons et al., 221 S. W. 782. Vaughn was struck and injured by an automobile truck in use for the delivery of beer and soda water in the City of St. Joseph. He sued W. F. Davis & Sons, of St. Joseph, and Dick & Brothers Quincy Brewery Company, an Illinois corporation, and had judgment. The brewery company, relator here, alone appealed. The Court of Appeals affirmed the judgment.

Relator contends the opinion rendered in the case is in several respects in conflict with decisions of this

court. One of these contentions goes to the ruling that there was sufficient evidence to take to the trial jury the question whether relator was liable for damages resulting from the truck driver's negligence. This makes it necessary to set out the facts stated in the opinion of the Court of Appeals in connection with the ruling mentioned. These facts are as follows:

"There was no question but that the driver was in the course of his employment, driving the truck in the business of delivering beer, for which it was intended and used; nor is there now any contention over the fact that he negligently ran plaintiff down and injured him permanently and seriously. The great contest is over the question whether the relationship of agency or master and servant can be said to have existed between the driver and the brewery company so as to render the latter liable for the former's negligence. Or, in other words, is the evidence such that the jury can say such a relationship did exist?

"The record discloses that at the time of the injury, and for four years prior thereto, Davis & Sons were distributing agents for the brewery company in the City of St. Joseph, and were also engaged in the manufacture and sale of soda water. They occupied a certain building at Main and Isadore streets on which the brewery company paid the rent, and in it were stored the shipments of beer which the brewery regularly made to St. Joseph. In it the brewery company maintained a refrigerating plant and paid the expense of refrigeration, so as to keep the beer at the proper temperature until it was delivered to the saloons and possibly elsewhere throughout the city. The brewery company paid for the wholesale and retail liquor licenses which were required of Davis & Sons. The brewery company fixed the price at which the beer, which Davis & Sons, distributed, was sold. Davis & Sons sold and delivered the beer from said warehouse or depot, collected the money for it, deducted their commission, and remitted the balance to the brewery company, and the empty barrels and cases

were returned to it at Quincy at the latter's expense. In addition to distributing beer, Davis & Sons collected rents and notes due the brewery company, representing it in making contracts whereby the retailer agreed with the brewery company to handle the brewery company's beer, and in the buying of saloons for the brewery which were licensed in the name of individuals, but which belonged to the company. The compensation Davis & Sons received for all these things was the commission they got on the beer sold.

"Formerly, the beer had been delivered in wagons furnished by the brewery company, but about a year before plaintiff's injury the brewery company in lieu thereof sent the truck in question to be used in the delivery of beer by Davis & Sons, and the purpose was to 'expedite the delivery of' the brewery company's beer in St. Joseph. At the direction of the company Davis & Sons had painted on one or both sides of the truck the sign 'Dick & Bros. Quincy Brewing Company,' the brewery company bearing the expense thereof. When it was necessary to repair the truck the expense thereof was borne by the brewery company. Also, at the direction of the company, Davis & Sons took out two policies of indemnity insurance, the premiums on both of which were paid by the company. One of these policies insured the the brewery company against loss or damage to the truck caused by collision, and the other insured the brewery company against liability on account of injuries to any person by the truck in question. After these policies were issued, but prior to plaintiff's injury, the truck was involved in another accident, claim for which was settled by an attorney representing the brewery company. This evidence in relation to the policies and the settlement of a claim thereunder was admitted solely as bearing on the relationship existing between the brewery company and the truck, together with the business in which it was being used. The foregoing facts were elicited from W. F. Davis, whom plaintiff put upon the stand, and who, when asked as to the arrangements between

Davis & Sons and the brewery company with reference to sending the truck to them, replied:

“ ‘They (the brewery company) sent it here for to use in their business.’

“ ‘And when asked why they sent it, he replied:

“ ‘They sent it here to be used in hauling and delivering beer. . Q. Whose beer? A. Dick & Bros., Quincy, Ill.’

“ ‘Under cross-examination, however, by the brewery company the following was brought out: That the driver of the truck was employed ‘through’ W. F. Davis & Sons, and they paid him; that Dick & Bros. Brewery Company sold beer to no one in St. Joseph except to Davis & Sons; that they, Davis & Sons, bought f. o. b. Quincy, Ill. In answer to the question, ‘Whose beer is it which you buy when it is loaded on the train at Quincy?’ He said, ‘It is supposed to be ours.’ It was further elicited by defendant in cross-examination of Davis, and through other testimony offered by the appellant herein, that Davis & Sons delivered the beer by means of this truck, which was owned by the brewery company, but was ‘loaned,’ without charge, for use as a matter of accommodation and custom between them, and that Davis & Sons were also permitted to use the truck in delivery of their soda water; that regardless of whether Davis & Sons sold the beer they ‘ordered’ or whether they collected or did not collect for it, they owed the amount they ordered. It was elicited, however, that when they ordered beer they ‘just sent in an order for it.’ When asked what terms are stated, witness answered, ‘No terms at all.’ When asked what were the agreed terms between them, he said, ‘We sell the beer and send them the invoice price.’ When asked if Davis & Sons sold a barrel of beer to a man in St. Joseph who never paid for it, would they ‘have to pay for that beer just the same to Dick Bros.?’ he answered, ‘Well, yes; we do.’ When asked who directed the driver of the truck where to go and prescribed his duties, he said. ‘W. F. Davis & Sons, I suppose.’ And when asked, ‘Did Dick

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Bros. have anything whatever to do with deciding who should drive the truck, where he should go, what he ought to do, or have anything to do by way of directing his actions?' he replied, 'None.' "

I. The Court of Appeals held the evidence sufficient to support the jury's finding that relator was responsible for the driver's negligence. Relator contends this ruling necessitates the quashing of the record.

(1) Relator sets out some things as evidence which do not appear in the opinion. These cannot be considered. [State ex rel. v. Ellison, 278 Mo. l. c. 47; **Other Evidence.** State ex rel. v. Reynolds, 226 S. W. 564; State ex rel. v. Ellison, 266 Mo. l. c. 610, 611.]

(2) Conflicts with decisions of the courts of appeals cannot be made the basis of a judgment quashing the record under examination. **Other Decisions.**

(3) Relator contends the ruling conflicts with Hays v. Hogan, 273 Mo. 1; Guthrie v. Holmes, 272 Mo. 215; Mockowik v. Railroad, 196 Mo. 550, and Bollman v. Bul-lene, 200 S. W. (Mo.) 1068. The gist of relator's argu-
Presumption right to have the issue in question sub-
Arising from mitted to the jury depended solely upon a
Ownership. presumption arising from the ownership of the truck, and that this presumption was destroyed by other evidence. In the Mockowik case the plaintiff had testified that he stepped upon a railroad track in front of a locomotive which he saw and at a place where he knew moving locomotives were likely to be encountered. He detailed all the facts. The court ruled his testimony showed him guilty of contributory negligence as a matter of law, and no presumption of ordinary care on his part could be invoked to defeat the conclusive force of the facts to which he had testified. In the case of Hays v. Hogan, supra, plaintiff had been injured by an auto-mobile driven by the son of the owner. Plaintiff relied upon the ownership of the car by the father and the fact

that the son was driving to show the latter was acting within the scope of presumed authority from the father. This court, at page 24, said, and on this relator now relies, that the mere "ownership of an automobile purchased by the father for the use and pleasure of himself and family does not render him liable in damages to a third person for injuries sustained thereby, through the negligence of his minor son while operating the same on the public highway, in furtherance of his own business or pleasure." The portion of the opinion in *Guthrie v. Holmes* relied upon by relator is as follows, page 233: "Proof that the automobile belonged to defendant and was being operated by defendant's regularly employed chauffeur was a prima-facie sufficient showing that the chauffeur was acting within the scope of his employment, and the burden of evidence shifted to the defendant to show the contrary. . . . This presumption cannot stand in the face of positive proof of facts to the contrary; and where the plaintiff has relied upon such presumption and it has been opposed by positive evidence to the contrary, he must then produce evidence tending to disprove the defendant's positive testimony, or his prima-facie case will fail. The presumption in question is rather a frail thing. It is unlike an inference that arises upon the proof of certain facts, and which is necessarily true if the facts are true. It rests upon the facts that the automobile was owned by the defendant, and that the chauffeur who was operating it was in the general employment of the defendant; neither one nor both of which tends to prove the chauffeur was engaged in the owner's business. [Berry on Law of Automobiles (2 Ed.), sec. 615, p. 694.]" The decision in *Bullman v. Bullene* follows the decisions from which we have quoted. We do not think relator makes out a case of conflict with these decisions. The Court of Appeals states in its opinion that plaintiff's case, on this issue, "does not rest upon any mere presumptions arising out of the ownership of the truck, but upon direct testimony concerning the relations existing between the brewery company" (relator) "and

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Davis & Sons, also upon inferences of fact which the jury were entitled to draw from all the evidence in the case." The question became one whether Davis & Sons were conducting the business of distributing beer for themselves and independently of relator, or in distributing beer acted as representatives and agents of relator and acted for it. The evidence tended to show the truck was owned by relator; that it had been substituted by relator for horse-drawn trucks previously furnished by relator for the same use; that relator caused its own name to be painted upon it when it was put in service; that no charge was made against Davis & Sons for its use; that repair bills were paid by relator; that relator paid the rent on the building occupied by Davis & Sons, and maintained, at its own expense, the refrigerating plant used for cooling the beer; that relator fixed the sale price of the beer; that containers, when empty, were returned to relator at its expense; that Davis & Sons acted for relator in collecting notes and rent and in buying saloon buildings for relator; that relator carried indemnity insurance on the truck in question and had previously settled a claim for damages arising out of an accident in which the truck had a part. W. F. Davis testified that relator furnished the truck for use in relator's business and in the distribution of relator's beer. This and other evidence appearing in the opinion tended to show, as a fact, that W. F. Davis & Sons were mere local agents acting for relator in St. Joseph. On cross-examination Davis qualified his testimony in some respects. We do not think it can be said, as a matter of law, his testimony on cross-examination, vague and halting in several respects, destroyed the testimony he had already given. It was for the jury to say when he told the truth, in all the circumstances. The point is ruled against relator.

II. In the Court of Appeals plaintiff's principal instruction was attacked. The chief objection relator urged was that the instruction purported to
Instruction. cover the case but authorized a finding for plaintiff without requiring the jury first to find the

existence of such a relation between Davis & Sons and the truck driver, on the one hand, and relator, on the other hand, as to render relator liable for results of the driver's negligence. The Court of Appeals held this objection was not well founded, and this ruling is said to conflict with decisions of this court. The Court of Appeals did not deny or question the rule that an instruction purporting to cover the case and authorize a verdict must require a finding of all essential facts. On the contrary, it recognized and applied that principle and held that the instruction conformed to it. The instruction required the jury, before finding for plaintiff, to find, among other things, that Davis & Sons, at the time of plaintiff's injury, were "engaged in the business of delivering and distributing *for the defendant*, Dick & Bros. Quincy Brewery Company, in said city of St. Joseph, the product hereinabove referred to as Dick & Bros. Quincy beer and . . . that on said date the defendant, Dick & Bros. Quincy Brewery Company, for the sole purpose and consideration of aiding and furthering *its* business in said City of St. Joseph, and of furthering the delivery and distribution, through defendants W. F. Davis & Sons, of its product known as Dick & Bros. Quincy beer, owned, kept, maintained and furnished to defendants, W. F. Davis & Sons, the . . . truck mentioned in evidence, and instructed, authorized and empowered said W. F. Davis & Sons to use, run and operate said . . . truck, or cause the same to be used, run and operated for the purpose of delivering" the product of the brewery company, and that Millikel (the driver) had been employed by Davis & Sons and was operating the truck "in and about the business of delivering and distributing the product of Dick Bros. Quincy Brewery Company known as Dick & Bros. Quincy beer," and that Millikel was guilty of certain acts of negligence by reason of which plaintiff was injured by the truck, and that plaintiff was then in the exercise of ordinary care.

We think the Court of Appeals was right in ruling that this instruction requires, before verdict for plaintiff,

a finding of facts which show such a relation of the relator to the driver as to render relator liable for the driver's negligence, if other facts predicated are found.

The outstanding issue of fact was whether Davis & Sons were acting for themselves or for relator in distributing beer. If the jury found that relator furnished the truck to Davis & Sons for use in its, relator's, business, and that Davis & Sons were, at the time, actually using the truck in distributing relator's beer, not for themselves, but "for the defendant, Dick & Bros. Quincy Brewery Company," the issue was covered and the fact resolved against relator. We agree with the Court of Appeals that the instruction might have been more brief and more clear, but also agree that it was not reversibly erroneous when tested by the principle and decisions invoked by relator.

III. In the opinion of the Court of Appeals appears the following:

"The evidence complained of consists of an answer made by plaintiff, at the outset of his testimony, to a question as to who composed his family. In order that it may appear just as it took place, we set out the record as follows:

" 'Q. What is your occupation? A. Farming.

" 'Q. Are you a married man? A. Yes, sir.

" 'Q. Who are the members of your family?'

"(At this point counsel who appeared for Davis & Sons said: 'We object to it as being irrelevant, incompetent and immaterial.' The court: 'Answer the question.' To which ruling of the court defendants at the time excepted.

" 'Q. Who compose your family? A. Ten children.

" 'Q. How many are at home with you? A. Two, now.' "

The Court of Appeals ruled that there was no objection made to the question which the witness actually answered; that the objection was made to a question the witness did not answer. A glance at the excerpt from

the opinion will make the ruling clear. Relator contends (1) the evidence was inadmissible, and (2) the ruling referred to conflicts with several decisions of this court. That such evidence ought not to be admitted is settled law in this State (*Dayharsh v. Railway*, 103 Mo. l. c. 577), and the Court of Appeals did not hold otherwise.

With respect to relator's second point, this court has held that once an objection has been seasonably made and overruled and exception saved it is not necessary, in order to save the point, to continue to repeat the objection to the same testimony, (*Schierbaum v. Schemme*, 157 Mo. l. c. 22), and that "the persisting in a running fire of the same objections to the same precise evidence may become indecorous and disrespectful." [*Bailey v. Kansas City*; 189 Mo. l. c. 513.] In the instant case the rule is peculiarly applicable. The question answered was not a new question. It was no more than a repetition (immediately following the ruling, objection and exception) of the question ruled upon, and the repetition was made merely to refresh the memory of the witness so that he might give the evidence just ruled admissible by the trial court. This ruling of the Court of Appeals on this point is in conflict with the principle in the cases last cited.

Respondents seek to justify the result of the ruling by other arguments. They suggest the objection was too broad and constituted no objection at all. Such an objection sometimes is held to be so. "But an exception exists to the rule. If the evidence objected to is not competent for any purpose in the case, a specific objection has no office and the general objection of irrelevancy, immateriality, etc., will do." [*Bailey v. Kansas City*, *supra*, l. c. 512; *State ex rel. v. Diemer*, 255 Mo. l. c. 350.] Neither did the Court of Appeals put its ruling on that ground. On the contrary, it, in effect, said it did not do so. It is suggested that it was not to be expected that in the opening of the trial the trial court could have known that the testimony objected to might not prove competent in some way in later stages of the proceeding. If

this be an adequate answer, then any incompetent evidence, provided it be wholly incompetent, can be admitted without error, since such evidence is open to hardly any other than a general objection, and no general objection would be good in the beginning of a trial under the rule contended for. It is further suggested that the answer, "ten children," which plaintiff made to the question asked was shown by subsequent testimony not to be responsive to the question, and there was no motion to strike out. The answer was entirely responsive. The subsequent testimony may have shown it to have been in part untrue, but did not show it to lack responsiveness to the question. It is further argued that the objection was not made by relator, but by counsel for Davis & Sons, and cannot now be relied upon by relator. The Court of Appeals in its opinion did not take that position. It points out that the *defendants* expected to the ruling and construed the word "defendants" to include all defendants. This is the proper construction. When one of several defendants makes an objection it is unnecessary for another to repeat it in order to put himself in position to base an assignment of error on it on appeal. In such case an exception to the ruling on the objection is enough, though the exceptor did not himself utter the words in which the objection is made. It is further objected that the motion for new trial did not cover the matter. The Court of Appeals did not so hold. The ground of the motion which is drawn in question by this suggestion, reads: "The court erred in admitting over the objection of this defendant, incompetent, irrelevant and immaterial evidence offered by the plaintiff." It is said the word "this" may have confined the court's attention to objections made by relator's counsel. It is clear relator could not have complained of the admission of the evidence unless it was admitted over its objection. Every ground of a motion for a new trial, to justify such a complaint in an appellate court, must have in it, explicit or implicit, the very thing which the suggestion

now being considered brings forward to exclude the ruling in question from consideration. To sustain this argument would seem to render it impossible for one of a group of defendants to adopt an objection made by another. We do not think such a rule would be desirable. There is no such rule now. As already pointed out, relator did adopt the objection and saved its exception to the ruling against it. It thereby became relator's objection and is covered by the motion.

We are of the opinion that the ruling of the Court of Appeals on this question of the admission of the evidence referred to in the beginning of this paragraph requires that the record be quashed. It is so ordered. All concur, except *Elder, J.*, not sitting:

THE STATE ex rel. CITY OF JEFFERSON v.
GEORGE E. HACKMANN, State Auditor.

In Banc, April 1, 1921.

1. **DEMURRER: General Grounds: Failure to Brief: Abandonment.** The general grounds of a demurrer in an original proceeding in the Supreme Court will be considered as abandoned if neither briefed nor urged. If the brief does not urge the general ground that the city did not have power to issue bonds for the purposes for which they were issued, but the objections are confined to irregularities in the issuance of them, the question of the power of the city to issue them will be considered as abandoned.
2. **ISSUE OF BONDS: Duty of State Auditor: Reviewable Error.** While it is the duty of the State Auditor to see to it that the requirements of the applicable statutes have been complied with before registering bonds issued by a city, his errors in judgment are reviewable by the Supreme Court in mandamus.
3. **——: To Pay Judgments: Notice: Describing Judgments.** The notice advising the voters that the purpose of the special election was to determine whether the city should issue its bonds in a named amount for the purpose of funding that much of the city's judgment indebtedness, was not insufficient because it did not describe the judgments.

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4. ———: ———: **Date of Judgment Misstated.** Where judgment against the city was rendered at one term, and on motion was set aside, and at a subsequent term another judgment for the same amount was rendered, and throughout the record it is admitted that the judgments were for the same indebtedness and that the voters voted for an issue of bonds to pay the said indebtedness, the fact that the ordinance, passed after the election and authorizing the issuance of the bonds, in its preamble described the judgment entered at the first term, does not invalidate the bonds.
5. ———: **Tax Ordinance: Per Cent Tax.** Although the ordinance which undertakes to levy a tax to pay the interest and principal of the bonds issued by the city does not levy a per cent tax on all the property, yet if it does say that there shall be annually levied a tax which shall raise a stated amount for each year, and these amounts are fully sufficient to meet the interests and the sinking fund, it meets the requirements of the Constitution. But even if it were an insufficient levy of a tax, that would not invalidate the bonds, because the city can be compelled, by the self-enforcing provision of the Constitution, to provide for the payment of the interest and principal as they become due.
6. ———: **Indebtedness: Presentation of Written Claims.** A contention that the statute (Sec. 8313, R. S. 1919) required the claims against the city for an indebtedness should have been presented in writing verified by the claimants, is without force where the record shows the indebtedness was reduced to judgments in the circuit court; for all defenses to the claims were foreclosed by such judgments.
7. ———: **Judgments: Defective Process: Waiver: Appearance.** The question whether process should have been served upon the mayor rather than the city clerk, in the suit by a creditor to recover judgment against the city, dropped out of the case when the attorney for the city appeared and filed answer.
8. ———: ———: **Questioning Authority of Attorney for City.** The city is the only party that can question the authority of an attorney who appeared and filed an answer to a creditor's petition to recover judgment against the city.
9. ———: ———: ———: **Appointment of Acting City Attorney.** Under an ordinance providing that in case of his absence from the city, the city attorney may, with the approval of the mayor and at his own expense, appoint some competent attorney to act in his stead during such absence, an attorney appointed by the city attorney, whose appointment is approved by the mayor, has authority to represent the city in a suit brought by a creditor to

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recover judgment against the city for a debt due. Section 18 of Article 2 of the Constitution is no authority for questioning the acts of an attorney so appointed.

Mandamus.

ALTERNATIVE WRIT MADE PERMANENT.

Leonard M. Rice, for relator.

(1) The bonds were issued under authority of and pursuant to Sections 1042, 1070 and 1071, Revised Statutes 1919. (2) The notice was sufficient. Sec. 1071, R. S. 1919; State ex rel. Clark Co. v. Hackmann, 218 S. W. 318; State ex rel. v. Hackmann, 273 Mo. 670. (3) It is true that in the preamble of the ordinance providing for the issuance of the bonds herein sought to be registered, the date of the judgments are referred to as "June 19, 1917," and that these judgments were subsequently set aside. However, other judgments were procured against relator, which said judgments, as pleaded in relator's petition for the alternative writ, and which allegation, by reason of respondent's demurrer, stands admitted, were, "in all respects, including amounts, like the judgments rendered in favor of said companies on the said nineteenth day of June, 1917." This, at most, is a mere clerical error, and in nowise affects the validity of the bonds. (4) Even if the council had made an insufficient levy, or had failed to make any levy whatever, the bonds would not be invalidated for that reason, since under our Constitution such levy can be made at any time, and if the city fails in its duty in this regard, mandamus will lie, and such levy can be directed made at any time *en masse* for all past due interest and principal. State ex rel. v. Gordon, 217 Mo. 103; Evans v. McFarland, 186 Mo. 703; Black v. Early, 208 Mo. 281; East St. Louis v. People, 124 Ill. 655; East St. Louis v. Amy, 120 U. S. 600; State ex rel. v. Hackmann, 275 Mo. 534; Lamar v. City of Lamar, 128 Mo. 188. (5) The judgments against relator city sought to be funded by the issuance of the bonds in question are conclusive against it as to the validity of the debts

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merged into the judgments. *Haishman v. Knox Co.*, 122 U. S. 316; *State ex rel. v. Rainey*, 74 Mo. 234; *Scotland Co. v. Hill*, 140 U. S. 41; *Sioux City Ry. Co. v. Osceola Co.*, 45 Iowa, 168; *Ibid*, 52 Iowa, 26; *Jones v. Hubbard*, 193 Mo. 165; *Howard v. City of Huron*, 62 L. R. A. (S. D.) 493; *Edmonson v. Ind. School Dist.*, 98 Iowa, 639. (6) It is true that service was not had upon the mayor. "Jurisdiction over the person can be acquired by service of the person according to law, or by consent, expressed or implied. Implied consent consists in doing such things as would indicate a willingness for the court to try the case—i. e., as filing answer or doing some similar thing without questioning the jurisdiction of the courts." *Mining & Milling Co. v. Fire Ins. Co.*, 267 Mo. 618; *Ringling v. Hempstead*, 193 Fed. 603. (7) Respondent, in paragraph 9 of his demurrer, challenges the authority of Fenton E. Luckett to act as city attorney upon behalf of relator. This point is untenable. Section 9, Ordinance No. 2, Revised Ordinances of the City of Jefferson, 1903. Luckett was at least *de facto* city attorney. *Harbaugh v. Winsor*, 38 Mo. 327; *Edwards v. City of Kirkwood*, 162 Mo. App. 576; *State v. Douglass*, 50 Mo. 593; *State ex rel. Lemon v. Buchanan County Board*, 108 Mo. 235; *Wilson v. Kimmel*, 109 Mo. 260; *Kiley v. Forsee*, 57 Mo. 390; *Akers v. Kolkmeier & Co.*, 97 Mo. App. 520; *Simpson v. McGonegal*, 52 Mo. App. 540; *Usher v. Tel. Co.*, 122 Mo. App. 111; *Hilgert v. Asphalt Pav. Co.*, 107 Mo. App. 38.

Jesse W. Barrett, Attorney-General, and *Robert J. Smith*, Assistant Attorney-General, for respondent.

(1) It is the duty of the State Auditor to determine whether there is authority of law for the issuance of the bonds, and whether all the conditions of the statutes applicable thereto have been complied with in the particular issuance of bonds presented for registration. Secs. 1063, 1068, R. S. 1919; *State ex rel. Dexter v. Gordon*, 251 Mo. 303; *State ex rel. Pike County v. Gordon*,

268 Mo. 326. (2) The voters of the city should be advised by proper notices of the election giving the names of the holders of the judgments, or a sufficient description of the judgments to properly advise them as to the amount of the judgments and the amount of the bonds to be issued to pay the particular judgments. The voters should be advised of the particular purpose of said election. Secs. 1070, 1071, R. S. 1919. (3) There must be valid judgments against the city. Said judgment must be properly described. There being no judgment rendered as of June 19, 1917, nor at the said June term, 1917, of the Circuit Court the judgment as of that date having been set aside and for naught held, and new and entirely different judgments rendered at a different term. Therefore no valid judgments existed as recited by the ordinance. The Auditor found that the law had not been complied with, and he was justified in refusing to register said bonds. Secs. 1063, 1068, R. S. 1919; State ex rel. v. Gordon, 251 Mo. 311. (4) There must be a levy of an annual tax sufficient to pay the interest on such indebtedness and also to provide a sinking fund for payment of the principal. Section 12, Art. 10, Mo. Constitution; Secs. 8316, 8656, R. S. 1919. (5) There should be proper showing that the claims and amounts against the city for which judgments were rendered had been properly presented in writing and verified by all of the claimants or their agents, since their claims did not arise *ex delicto*. Sec. 8313, R. S. 1919; Haggard v. City of Carthage, 168 Mo. 129. There was no valid judgment against said city because process should have been served upon the Mayor of said city and not upon the clerk as was done in this instance. Cloud v. Pierce, 86 Mo. 357. (7) There was a vacancy in the office of city attorney because of the absence of the elected city attorney from May, 1917, to January, 1919, and the purported acting city attorney was without authority to bind the city. Sec. 18, Art. 2, Mo. Constitution; Sec. 11, City Ordinance.

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GRAVES, J.—Learned counsel for respondent concedes that relator has clearly stated the facts in its application for our writ. Respondent's counsel, the Attorney-General, waived the formal issuance of our alternative writ of mandamus, and the application for such writ was taken as and for the alternative writ. To this respondent filed a demurrer, and the questions are of law, rather than of facts.

By an election held on the 24th day of August, 1920, the City of Jefferson authorized the issuance of \$22,000 in bonds, with which to take up a part of certain alleged judgment indebtedness of such city. These bonds respondent refused to register, and by this action in mandamus, the city seeks to compel their registry. The city, through its city attorney, in its application here, alleges all the facts, both those favorable and those unfavorable. These allegations of facts are accompanied with (as exhibits) all the records of the city and the circuit court in the whole proceeding. The demurrer filed by counsel for respondent will suggest the points for discussion, without an outline in this statement of the facts pleaded in the application. This demurrer reads:

“Comes now the respondent, George E. Hackmann, State Auditor of the State of Missouri, and demurs to relator's petition herein, and as grounds therefor assigns the following, to-wit:

“1. Because the said petition does not state facts sufficient to constitute a cause of action against the respondent herein:

“2. Because said petition and all the matters and things therein stated and set forth are not sufficient in law to entitle the relator to the relief prayed for or any other relief.

“3. Because it appears from the face of the petition that no mention of the judgments to be paid is made in the ordinance submitting the proposition to the voters, nor in the notices given by the clerk of the city, giving the names of the parties in whose favor the judgments were rendered, nor the dates nor the

amounts thereof, and the voters of said City of Jefferson were not advised by said ordinances and notices as to who the judgment creditors were, nor the amounts of said judgments.

“4. Because the petition shows upon its face, in relator’s Exhibit No. 6, that the indebtedness of said city amounts to approximately \$66,217.69, evidenced by judgments as of date June 19, 1917, in favor of the Jefferson City Light, Heat & Power Company against the City of Jefferson in the sum of \$41,266.80, and in favor of the Capital City Water Company against the said City of Jefferson in the sum of \$24,950.89, and relator’s petition shows that said judgments were by consent of both parties, plaintiff and defendant, therein, set aside and for naught held, and that no judgment or judgments were rendered against the said City of Jefferson on said date, nor in said amount, nor at said June, 1917, term of the Circuit Court of Cole County, Missouri.

“5. Because the said purported judgment sought to be paid by the issuance and sale of the bonds sought to be issued herein were invalid judgments after having been set aside on November 17, 1917.

“6. Because relator’s petition shows upon its face that the said City of Jefferson, before or at the time of submitting the proposition of said bond issue to the vote of the people, did not provide for a levy of an annual tax sufficient to pay the interest on such indebtedness as it should fall due, and failed to provide for a sinking fund for payment of the principal thereon within the twenty years from the contracting of the same as provided by Section 8316, Revised Statutes 1919.

“7. Because relator’s petition shows upon its face that Section 8313, Revised Statutes 1919, was not complied with by the relator in that no showing is made that said claims and amounts against said city were presented in writing and verified by oath of the claimant or its agent.

"8. Because relator's petition shows upon its face that the judgments described therein were void because service of process therein was had upon the clerk of the City of Jefferson, and not upon the mayor of such city, as provided by law.

"9. Because the petition shows upon its face that F. E. Lockett, purported to be the then acting City Attorney, was not legally authorized to act as such. The leaving of the State of Missouri and of the United States by the City Attorney, without personally devoting his time to the performance of the duties of his office for an indefinite period, vacated the office of city attorney, or subjected said attorney to removal from office under Section 18 of Article II of the Constitution of the State of Missouri.

"Wherefore, respondent herein prays judgment of the court upon this demurrer and that he be discharged from further proceedings in this case."

As the facts stand conceded by this demurrer, we can best discuss the facts charged in the application for our writ, in connection with the points made by the demurrer. Such will be our course, and this will suffice for the preliminary outline of the case.

I. It has long been ruled that points made in the course of the trial may be abandoned here, by failure to brief or urge such points. The same would apply to pleadings in original proceedings here. The general grounds of the demurrer have been somewhat abandoned here by the points made and presented in the brief for the respondent. This brief does not urge that the City of Jefferson had no authority to issue bonds to the extent of \$22,000 for the purpose for which these bonds were being issued. The objections go to irregularities, rather than the power of the city. The general grounds of the demurrer might raise such question, had it been followed up in this court. The points urged in the brief here do not follow up this general question, but specifically take up the questions relied upon by respondent. Those questions, and those only,

**Failure
to Brief.**

State ex rel. City of Jefferson v. Hackman.

are for our consideration. All others are presumed to have been abandoned, for want of substance. They were no doubt abandoned in view of our recent ruling in State ex rel. Clark Co. v. Hackmann, 280 Mo. 686.

II. The respondent first urges that it is his duty under the law to see that the conditions of the applicable statutes have been complied with, before he should register the bonds. This is his duty, but if he errs in his judgment as to whether or not the facts show such compliance, his act in refusing to register is reviewable here upon mandamus. So runs a long list of cases in mandamus against our several state auditors.

Reviewable
Error.

III. In the second place it is urged by the respondent that the notice of the special election is insufficient, in that it did not specify who held the judgments against the city. The notice advised the voters that the purpose of the special election was to determine the question as to whether or not the city should issue \$22,000 in bonds, for the purpose of funding that much of the city's judgment indebtedness. As a fact there were two judgments against the city, which aggregated over \$66,000. One was in favor of the Jefferson City Light, Heat & Power Company, and the other in favor of the Capital City Water Company. We are cited to Sections 1070 and 1071, Revised Statutes 1919, upon this contention. These sections do not require the notice to describe the judgments, and this contention must be ruled against the respondent.

IV. The facts are that the city, being unable to pay what it owed to these two public service corporations, and desiring to have the amounts of indebtedness fixed, by resolution of the city council May 7, 1917, requested such corporations to reduce their claims for service to the city to judgments. Pursuant to such requests of the city these corporations filed their suits, returnable to the June term, 1917, of the Cole County Circuit Court. At this

Misrecital
in Ordinance.

term the two corporations obtained their respective judgments. Prior thereto Leonard M. Rice, who now represents the relator here, was the duly elected city attorney. On June 4th after the suits were filed, Rice, being desirous of serving in the recent World War, arranged to enter a training camp, and not knowing the time of his absence, and in pursuance of an ordinance of the city, appointed Fenton E. Luckett, a licensed lawyer of the State, to act in his place. Luckett appeared at the June term, *supra*, and filed answer, and after judgments were entered filed motions for new trial, which were sustained. He then amended his answers, and upon trial in January, 1918, new judgments were obtained in each of said cases, but on the identical causes of action. These facts are alleged in the petition for mandamus here, and stand admitted by the demurrer filed by respondent. The ordinance submitting the proposition was like the notice we have just discussed. It submitted the question as to whether or not the city should issue \$22,000 in bonds, the proceeds thereof to be applied upon the judgment indebtedness of the city. After the election was held, and the issuance of the bonds had been overwhelmingly endorsed by the voters, the city passed another ordinance in September, 1920, providing for the issuance of the bonds. In the preamble to this ordinance the judgments are described as of June 19, 1917, when in fact they were of January, 1918. The ordinance in its body provides for the issuance of the bonds, their form, the levy of taxes for the payment of annual interest, and for a sinking fund, and many other recitations and details. It is urged that this misrecital of the date of the judgments in the preamble of the ordinance invalidates these bonds. We are not inclined to that view. Throughout, the city had, by the ordinance calling the election, and by the notice thereof, been dealing with its judgment indebtedness. The whole proceedings show that these two judgments, first obtained in June, 1917, and later upon retrial in January, 1918, were the judgment debts under considera-

tion. In this contention we do not agree with respondent. This ordinance was the usual formal ordinance for the mere issuance of the bonds, after they had been duly authorized by a vote, under a valid ordinance calling for the election, in which judgment indebtedness was the subject of consideration, and the minute description of the several judgments making up the city's judgment indebtedness was immaterial. Then by demurrer to the petition, the respondent admits the fact that the judgments of June and January were for the same indebtedness. In fact this is made clear throughout the whole record presented to the respondent when the bonds were tendered for registration. We therefore rule this contention against the respondent.

V. The ordinance authorizing the issuance of the bonds, in Sections 4 and 5 thereof, provides:

"Sec. 4. For the purpose of providing for the payment of interest on the said bonds there shall be, and there is hereby, levied a direct annual tax upon all the taxable property in the City of Jefferson, a sum sufficient to produce thirteen hundred and twenty dollars (\$1,320) per annum until such a time as said bonds are redeemed, and upon the redemption of any one or more of the said bonds the amount of taxes hereby levied for the payment of interest shall be reduced in the sum of sixty dollars (\$60) per annum for each bond so redeemed; and for the purpose of creating a sinking fund for the payment of the principal of said bonds there shall be, and there is hereby levied a direct annual tax upon all the taxable property in the City of Jefferson sufficient to produce the sum of eleven hundred dollars (\$1,100) per annum until such time as said bonds, and each and all of them have been fully paid off and discharged, and a sum sufficient to produce the accumulated sums of twenty-two thousand dollars (\$22,000) in a period of twenty years.

"Provision to meet the requirements of this section, shall, in due time, manner and season, be annually hereafter made.

"Sec. 5. Said tax shall be extended upon the tax rolls in each of the several years respectively, shall be levied and collected at the same time and in the same manner that other city taxes are levied and collected and the proceeds derived from said taxes shall be used exclusively for the payment of the principal and interest of the bonds herein authorized."

The contention is that such does not levy a tax for interest and sinking fund within the meaning of Section 12 of Article X of the Missouri Constitution. In this section of the Constitution, it is provided:

"And provided further, that any county, city, town, township, school district or other political corporation or subdivision of the State, incurring any indebtedness requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same."

It is true that this ordinance does not levy a percentum tax on all property for the purposes, but it does say that there shall be levied upon all property (each year) a tax which shall raise a stated amount for each purpose, which amounts are fully sufficient to taking care of the interest and the sinking fund. But even if this was an insufficient levy of a tax, such does not invalidate the bonds. The city can be compelled to properly care for both principal and interest. [State ex rel. v. Gordon, 217 Mo. l. c. 119 et seq.]

The statutes cited by learned counsel (Sections 8316 and 8656, R. S. 1919) are but rescripts of the constitutional provision we have quoted. They neither add to nor take from such constitutional provision, and this constitutional provision we have held to be self enforcing. [State ex rel. v. Hackman, 275 Mo. l. c. 541.] We therefore rule that there is no substance in this contention of the respondent.

VI. It is further contended that there should be a proper showing that the claims and amounts against the city, for which judgments were entered, had been properly presented in writing and verified by the claimants or their agents.

Verified
Claim.

We are cited to Section 8313, Revised Statutes 1919, but this section had no application here. Here the record shows judgment, and all defenses to the claims out of which the judgment grew, were foreclosed by the judgments themselves.

VII. It appears that the process in the two suits was served upon the city clerk rather than upon the mayor. This question dropped out of the case when the attorney for the city filed its answer in the case. The filing of the answers waived any defect in the service of the process. But it is further urged that Luckett, who acted for the city, had no power to act. The city is the only party to question his authority to act, and the city has not questioned it. Nor does it now question it, but on the other hand it is here recognizing the judgments, and asking for the registration of those bonds so that it can pay portions thereof. This should suffice. But in addition to this the ordinance of the city provided this:

“In case of sickness, absence from the city or other temporary inability of the city attorney to discharge the duties of his office, he may, with the approbation of the mayor and at his own expense, appoint some competent attorney to act in his stead during such sickness, absence from the city or other inability of the city attorney.”

Luckett had been appointed by Rice and the appointment had been approved by the mayor, under the terms of this ordinance. The ordinance was at least express authority for Rice, with the consent of the mayor, to procure some attorney to act for him during his absence in cases in which the city was interested. He possessed that power so long as he remained city attorney. We are cited to Section 18 of Article II of the

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Constitution. Such section might have been authority for the removal of Rice from office (a question not for decision here), but it is no authority for questioning his acts whilst he held the office.

We see no reason why these bonds should not be registered. All the facts were before the Auditor, as they are now before us.

Let our alternative writ of mandamus be made permanent. All concur.

THE STATE ex rel. BROTHERHOOD OF AMERICAN
YEOMAN v. GEORGE D. REYNOLDS et al.,
Judges of St. Louis Court of Appeals.

In Banc, April 1, 1921.

1. **LIFE INSURANCE: Misrepresentations as Defense: Tender of Premiums.** Section 6401, Revised Statutes 1919, found in the article relating to fraternal beneficiary associations and declaring that "such societies shall be governed by this article and shall be exempt from all provisions of the insurance laws of this State, not only in governmental relations with the State, but for every other purpose," exempts such associations from the requirements of Section 6940, found in the general insurance law and declaring that in suits brought upon life policies "no defense based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court for the benefit of the plaintiff the premiums received on such policies." The beneficiary association, when sued by a certificate holder for physical disabilities, can interpose the defense of misrepresentations on his part in obtaining the policy, without having returned or tendered the premiums received.
2. ———: ———: ———: **Contrary Ruling by Court of Appeals: Exception to General Statute.** The Supreme Court had ruled in *State ex rel. Garesche v. Roach*, 258 Mo. 1. c. 552, that the general provisions of a statute must yield to special provisions where there is a conflict and where the general provisions of one part of the statute are inconsistent with the more specific provisions of another part; the Court of Appeals, therefore, contravened said previous decision in holding in *Wilson v. Brotherhood of*

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American Yeomen, 223 S. W. 992, that Section 6940, Revised Statutes 1919, found in the general insurance law, prevents a fraternal beneficiary association, when sued by a certificate holder, from interposing, as a defense, misrepresentations by the holder in obtaining the certificate, unless it has returned or tendered the premiums paid, since Section 6401 relates specifically to such societies and exempts them, for every purpose, from the operation of said general law. The Court of Appeals, in so ruling, further contravened the previous decision of the Supreme Court in *Hanford v. Mass Ben. Assn.*, 122 Mo. 50, wherein, in discussing the applicability of the general insurance law in reference to misrepresentations interposed as defenses to actions upon policies issued by assessment companies, it was ruled that corporations doing business under the assessment statute are not subject to any other provisions of the general insurance law except as therein distinctly set forth.

3. **CERTIORARI: To Court of Appeals: Conflict in Opinions.** A court of appeals is vested with power to authoritatively construe a statute, and mere erroneous interpretation thereof does not warrant a quashing of its opinion in any case; but where its construction contravenes prior decisions of the Supreme Court its opinion will be quashed upon *certiorari*, for the Constitution gives the Supreme Court supervisory jurisdiction where the court of appeals has not followed its last previous ruling.

Certiorari.

RECORD QUASHED.

John D. Denison and Lehmann & Lehmann for relator.

The opinion of the Court of Appeals is in direct conflict with the controlling decision of the Supreme Court in the case of *Hanford v. Massachusetts Mutual Benefit Association*, 122 Mo. 50. Sec. 6940, R. S. 1909, is a remedial statute, and prior to the enactment thereof, the tender of premiums received was not a condition precedent to the defense of misrepresentation. *Loehner Mutual Ins. Co.*, 17 Mo. 247; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Hanford v. Mass. Benefit Assn.*, 122 Mo. 50; *Schuerman v. Ins. Co.*, 165 Mo. 641; *Aloe v. Mutual Life Assn.*, 147 Mo. 561; *Aloe v. Ins. Co.*, 164

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Mo. 675; Kern v. Legion of Honor, 167 Mo. 471; Jenkins v. Ins. Co., 171 Mo. 375.

Joseph Reilly for respondents.

(1) The answer of the relator filed in the circuit court fails to state facts sufficient to constitute a defense to the plaintiff's cause of action; the certificate of relator fails to meet the requirements of the law. Brassfield v. Maccabees, 92 Mo. App. 102; Brassfield v. Woodmen, 88 Mo. App. 208; Gruwell v. National Council, 126 Mo. App. 496; Barker v. Railroad, 91 Mo. 94; State ex rel. v. Vandiver, 213 Mo. 198; Odelheide v. Modern Brotherhood of America, 268 Mo. 347; Toomey v. Supreme Lodge, 147 Mo. 129; Aloe v. Life Assn., 164 Mo. 675; Christian v. Ins. Co., 143 Mo. 460; Richey v. Ins. Co., 104 Mo. App. 149; Sec. 6405, R. S. 1919; Laws 1911, p. 284. (2) The opinion of the Court of Appeals is not in conflict with the opinion of this court in the case of Hanford v. Insurance Co., 122 Mo. 50. (3) The opinion of the Court of Appeals follows the law of Missouri as it is now and always has been. Siple v. Robinson, 129 Mo. 208; Long v. Abstract Co., 252 Mo. 158; Drucker v. Insurance Co., 223 S. W. 990; Jarrett v. Norton, 44 Mo. 277; Estes v. Reynolds, 75 Mo. 563; Kern v. Insurance Co., 167 Mo. 487; Bishop on Contracts, secs. 679-683; 13 C. J. p. 620.

WALKER, C. J.—*Certiorari* is here invoked to quash the record of the St. Louis Court of Appeals in Wilson v. Brotherhood of American Yeomen, 223 S. W. 992. In the original action the plaintiff had brought suit against the defendant, a fraternal beneficiary association, to recover for a disability, payment for same having been provided for in the policy or certificate of membership. At the trial defendant sought to interpose the defense of misrepresentation on the part of the plaintiff in securing the policy. Objections to this defense were sustained on the ground that the premiums

received had not been returned or tendered to the plaintiff. There was a judgment for the plaintiff, which, upon appeal to the Court of Appeals, was affirmed. The character of the association is conceded. There is no dispute as to the facts. The only question involved is one of law, viz.: is it a prerequisite to the right of the defendant to interpose the defense of misrepresentation that premiums received by it be returned or tendered to the plaintiff? The Court of Appeals so held.

Governed by elementary rules of construction with the relevant statutes before us, this question need not be difficult of solution. Under a general law it is provided that "in suits brought upon life policies, heretofore or hereafter issued, no defense based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court for the benefit of the plaintiff the premiums received on such policies." [Sec. 6940, R. S. 1909; Sec. 6145, R. S. 1919.]

The regulation of the business of life insurance is, under our statute, variously subdivided, in that each article authorizes the organization, defines the nature and prescribes the manner of conducting the business of a certain class or kind of companies distinct from the others, and subject, in many particulars, on account of their character, to the law of their creation alone. These separate statutes, however, do not prevent the application, in the absence of exceptions, of the above statute in regard to misrepresentations to any class of policies.

In ruling upon a statute (Sec. 6937, R. S. 1909; Sec. 6142, R. S. 1919) defining the materiality of misrepresentations as affecting the validity of policies we have held that this section applied to all companies not specifically excepted and to all policies written since its enactment. [Christian v. Mut. Life Ins. Co., 143 Mo. 460.] By parity of reasoning and in harmony with the canons of construction, the rule thus announced may be held applicable to the statute above quoted. [Sec. 6145, supra.] This

ruling would, without more, render fraternal beneficiary associations subject to that section, or, more specifically, make it a prerequisite for a defendant to tender or return the premiums received to the plaintiff before being allowed to interpose the defense of misrepresentations. However, we find, upon an examination of Article XV of the Insurance Law concerning fraternal beneficiary associations, the following section: "Except as herein provided, such societies shall be governed by this article and shall be exempt from all provisions of the insurance laws of this State, not only in governmental relations with the State, but for every other purpose, and no law hereafter enacted shall apply to them unless they be expressly designated therein." [Sec. 5, Laws 1911, p. 285; Sec. 6401, R. S. 1919.]

The language of this section is such that it would be difficult to employ words more comprehensive of the legislative purpose to exempt this class of associations from the provisions of the general insurance law, and to restrict their operations to the statute of their creation. In harmony, therefore, with the rules of construction which, in our opinion, are in accord with right reasoning, there is no escape from this conclusion. That the ruling of the Court of Appeals is in error in holding to the contrary there does not seem to be any question. But as we said, in effect, in *State ex rel. Peters v. Reynolds*, 214 S. W. 1. c. 122, "this court is not to determine whether the St. Louis Court of Appeals erred in its application of rules of law to the facts in the record before it, but only whether in announcing the law of the case upon the facts as stated in its opinion it failed to follow the last previous rulings of this court."

This ruling, which is but a repetition of others to a like effect, was not intended and does not limit the right of Courts of Appeals to authoritatively construe any statute. Their right in this regard is final and unlimited except where their construction contravenes a decision of this court. Until such contravention is found to exist, our interference by *certiorari* is unauthorized,

because our supervisory jurisdiction is founded solely upon the fact that a Court of Appeals has not followed our last previous ruling. [Art. VI, sec. 6, Mo. Const.; State ex rel. Gilman v. Robertson, 264 Mo. 661; State ex rel. Tiffany v. Ellison, 266 Mo. 604.]

Under the foregoing clearly defined limitation upon our powers of supervision, it not only becomes pertinent, but necessary, to determine whether the ruling of the Court of Appeals runs counter to our decisions, either as regards a general principle of law announced by this court, or, under a like state of facts, has announced a ruling contrary to that of this court. [State ex rel. Peters v. Reynolds, 214 S. W. (Mo.) l. c. 122.]

A familiar rule of construction frequently recognized by this court is that the general provisions of a statute must yield to special provisions where there is a conflict and where the general provisions in one part of the statute are inconsistent with the more specific provisions in another part. [State ex rel. Garesche v. Roach, 258 Mo. l. c. 552.]

The statute defining the conditions under which the right to the defense of misrepresentation may be exercised in a suit upon a life policy is general in its nature. In the absence of restrictions it may be invoked in a suit upon any life policy. The original action upon which the suit at bar is based was brought upon a policy or certificate of membership issued by a fraternal beneficiary association. This statute (Art. XV, chap. 50, R. S. 1919) contains, among other things, the section upon exemptions which we have shown constitutes an unequivocal restriction upon the application of the general statute above referred to, and confines the rights and powers of such association to the statute of its creation. In ruling to the contrary the Court of Appeals, therefore, was not only in error, but it ran counter to our holding in the Garesche-Roach case, *supra*, and others.

Futhermore, the Court of Appeals opinion is contrary to a general rule of construction applicable to statutes of the character here under review as announced

by this court in *Hanford v. Mass. Mut. Ben. Assn.*, 122 Mo. 50, in which, in discussing the application of the general insurance law in regard to misrepresentations interposed as defenses to suits upon policies issued by assessment companies, it was ruled that corporations doing business under the assessment statute are not subject to any other provisions or requirements of the general insurance law except as therein distinctly set forth. This ruling was based upon a statute (Sec. 5869, R. S. 1889; now Sec. 6154, R. S. 1919) having particular reference to insurance companies operating under the assessment plan. While this is true, the doctrine announced is, in its last analysis, based upon the rule of construction in regard to general and special statutes, and is as applicable to a statute of exemptions in regard to fraternal beneficiary associations as it is to one having reference to the class of companies then under review.

In the late case of *Bankers Life v. Chorn*, 186 S. W. (Mo.) 1. c. 684, this court, in discussing the statute defining the exemptions from the general insurance law of assessment companies, said, in passing, in regard to the similar but more comprehensive statute in regard to fraternal beneficiary associations here under review, that while the language of the latter was redundant, it denoted the exemption of that class of associations from the insurance law of the State in every respect. Employed as an illustration, this declaration cannot be said to rise to the dignity of a ruling, but it cannot be otherwise regarded than as a recognition of the doctrine announced in the *Garesche-Roach* and *Hanford* cases, *supra*, concerning the construction to be given general and special statutes and hence at a variance with the ruling of the Court of Appeals.

From the foregoing we conclude that principles of law announced in our decisions are contravened in the original case by the opinion of the Court of Appeals, and that its record therein should be quashed.

It is so ordered. All concur.

JAMES C. JONES et al. v. JUDSON SANDERSON,
Appellant.

In Banc, April 1, 1921.

1. **ATTORNEY: Disbarment: Indictable Offense.** A final judgment disbarring an attorney from practicing law on a charge that he has been guilty of an indictable offense, but not charging that he has been indicted and convicted, cannot be rendered, but before he can be finally disbarred the court hearing the disbarment proceeding must await the determination of the indictable offense in the court having charge of such criminal case.
2. ———: ———: ———: **Suspension: Final Judgment.** Where the information in a disbarment proceeding charges an indictable offense, but does not charge a trial and conviction, the power of the trial court is limited to a mere suspension of the attorney from practice until the facts can be ascertained in a trial upon an indictment. But a judgment disbarring an attorney for a period of twelve months from and after a certain date and finally disposing of the case, adding thereto a judgment for costs against him, is not a suspension, but a final judgment, and one the trial court had no power to render before an indictment and conviction. A suspension for a fixed term is not a judgment of suspension under the statute.
3. ———: ———: ———: **Power to Hear The Facts.** Where the information in the disbarment proceeding charges against an attorney indictable offenses, the court hearing the disbarment proceeding is without power to hear and determine the facts, but that power is by the statute placed in the court having charge of the criminal offenses mentioned in said information.
4. ———: ———: ———: **Jurisdiction: Waiver.** In a disbarment proceeding based upon an information charging an attorney with an indictable offense only, the circuit court is without power to hear and determine the facts tending to show him guilty of such offense; and if the court, nevertheless, proceeds to hear said facts and enters final judgment of disbarment based thereon, said judgment is in excess of its jurisdiction, and the attorney does not waive excessive jurisdiction by proceeding to trial, for there can be no waiver where the court is without power to hear and determine the facts.

Jones v. Sanderson.

5. ———: ———: ———: **Evidence.** Where the petition for disbarment rests upon indictable offenses, the only proof which will justify a permanent disbarment, or a fixed term of suspension, is a judgment of guilt from a court which tried the case upon the indictment and heard the facts offered to sustain it.

Appeal from Andrain Circuit Court.—*Hon. Ernest S. Gantt*, Judge.

DISMISSED.

R. D. Rogers and McBaine, Clark & Rollins for appellant.

(1) The evidence in this case does not prove that appellant violated any law or his oath as an attorney at law by interviewing the witnesses in the case pending against the Klick brothers. The testimony does not show that the appellant tried to obtain these witness to change their testimony or to get them to swear falsely in the Klick cases. The offenses charged by the petition for disbarment are indictable offenses, and under the law the appellant could not be disbarred or suspended for a definite term until he first had been indicted and convicted by a common law jury. Secs. 951 to 959, R. S. 1909; *State ex rel. Selleck v. Reynolds*, 252 Mo. 369; *Laws* 1909, p. 151. The petition for disbarment charged appellant with both the statutory crime and common law crime. Sec. 4352, R. S. 1909; 12 C. J. 195; *State v. Appling*, 25 Mo. 315; Secs. 8047-8, R. S. 1909; *Kelley Criminal Law* (3 Ed.), pages 4 and 5, 733; *State v. Rose*, 32 Mo. 560; *State v. Snyder*, 44 Mo. App. 429; *State v. Dalton*, 134 Mo. App. 514; *Perry v. Strawbridge*, 209 Mo. 621; *King v. Higgins*, 2 East R. 17; *King v. Phillips*, 6 East R. 456; *State v. Dewit*, 20 S. Car. L. 282, 29 Am. Dec. 371; *State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 450; *United States v. Debolt*, 253 Fed. 78. (2) It was an offense at common law to solicit one to commit a crime that is indictable through the solicitation is of no effect and no crime is in fact committed. 16 C. J.

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117; State v. Hays, 78 Mo. 307; Queen v. Williams, 1 Den. (Brit. Cr. Cases) 39; 1 Bishop, Crim Law, sec. 767; Commonwealth v. Jacobs, 9 Allen, 274; Sec. 4894, R. S. 1909. (3) The acts charged against appellant in the petition were indictable offenses against the United States Government. Secs. 125 and 126, 4 United States Statutes Ann. Crimes, 178-184; United States v. Lyle, 26 Fed. Cas. 15, 4 Cranch C. C. 469; 16 C. J. 111; United States v. Worrall, 28 Fed. Cas. 16-766, 2 Dall. 384; United States v. Debolt, 253 Fed. 78; Heinze v. United States, 181 Fed. 322; United States v. Wilder, 143 Fed. 433.

James C. Jones and Charles W. German for respondent.

(1) It is first urged by counsel that the evidence is insufficient to support the finding and judgment of the court. If we apply the rule that where there is any evidence tending to support the finding and judgment of the trial court this court will not interfere, the point made by counsel must be determined against the defendant. (2) The second point urged by counsel is that the petition charges indictable offenses and from this premise the erroneous conclusion is drawn that the decree of the trial court was not justified and that this case must for that reason be reversed. The error into which counsel have fallen is forcibly illustrated by the statement that "if an indictable offense is involved there can be no suspension before a trial by jury and a conviction." And in support of this assertion counsel cite the case of State ex rel. Selleck v. Reynolds, 252 Mo. 369. The provisions of the statute do not justify any such statement or conclusion and the decision of this court in the Selleck case falls just as far short of forming the basis for such a conclusion. The statutory scheme clearly provides for either of two results, namely: (a) removal or disbarment; (b) suspension from practice. That these are distinct and separate results arrived at and obtained in separate and distinct ways is at once apparent from a reading of Secs. 951 to 958 R. S.

1909, and from a reading of the opinion in the Selleck case. Nothing can be clearer than this, and yet it seems that counsel have wholly failed to grasp the distinction and thus have fallen into error. The opinion of the Court of Appeals in the Selleck case was quashed by this court, because there the charge was for an indictable offense, and there was admittedly no conviction, and yet the decree was disbarment or removal from the practice, not suspension. The reasoning so clearly and forcefully stated, plainly shows that the error was in the conclusion arrived at, or decree entered by the trial court, namely, that of removal or disbarment, instead of suspension, pending indictment and trial in a court where the defendant could have the benefit of a jury trial.

WOODSON, J.—This suit was instituted in the Circuit Court of Callaway County by plaintiffs and against the defendant, seeking to disbar him from practicing law in the courts of this State. The trial court sustained the charges made against him and disbarred him for a period of twelve months from and after March 28, 1919. In due course the defendant appealed the cause to this court.

The record in the case is very long, covering about two hundred and seventy pages of printed matter, and the statement of counsel for appellant covers about fifty, but from the view we take of the case, it will be unnecessary for us to go into details of the facts of the case.

It will suffice to state that the Klick brothers, five in number, during the war were charged with being in sympathy with Germany, and made some very violent language against this country and in favor of Germany. This was called to the attention of the Council for the Defense, which caused charges to be prepared against them in the United States District Court at Jefferson City, Missouri, charging them with disloyalty, etc. They were duly arrested upon those charges and arraigned before the commissioner of that court, whereupon the

appellant, who was a duly licensed and practicing attorney-at-law of this State, was employed by the Klick brothers to defend them against those charges. In the performance of that duty, it is charged that appellant was guilty of unbecoming and improper conduct, in that he attempted to induce the witnesses against the Klicks to change their testimony; in other words, was guilty of an attempt of subornation of perjury. These are the matters that constitute the basis of the charges against the appellant in this case, which, as before stated, the trial court found to be true.

The offense charged in the disbarment proceedings against the appellant is conceded to be an indictable offense, and under the law of this State as declared by this court in the case of *State ex rel. Selleck v. Reynolds*, 252 Mo. 369, he cannot be disbarred or suspended for a definite term as a punishment, before having been indicted and convicted by a jury of his country. That being the law, and there being no pretense that appellant has been indicted or convicted, this proceeding must be dismissed, and it is so ordered. All concur; *Graves, J.*, in a separate opinion, in which all concur.

GRAVES, J. (concurring).—I agree with my learned brother wherein he says that this case should be ruled against the officers of the State Bar Association and in favor of the appellant, Sanderson, in obedience to the law as declared in *State ex rel. Selleck v. Reynolds*, 252 Mo. 369. Sanderson was proceeded against under the same statutes as was Selleck. The laws were not changed until 1919 (*Laws of 1919*, p. 151), and this cause was begun before the Act of 1919 became effective. The trial was had and the judgment entered before the Act of 1919 became effective. So that the Revised Statutes of 1909, as quoted in Selleck's case, *supra*, was the governing law. I would not add this separate concurrence but for the fact that the learned representatives of the State Bar Association urge that Selleck's case sustains this judgment. As the writer of the Selleck opinion,

I feel called upon to disabuse the minds of counsel upon this contention.

The petition for disbarment in this case clearly charges indictable offenses both as against the State and Federal laws, and this is not seriously controverted by learned counsel for the Bar Association. What they contend is that under the rule in *Selleck's* case the court had the right to suspend Sanderson, because the charges were of indictable offenses, and Sanderson could not complain because his suspension was for only twelve months. They contend that the suspension might have run for the statutory period of limitation for the prosecution of the crimes. The trouble with learned counsel is that they overlook their own judgment in the case. This judgment does not suspend Sanderson until an indictment might be secured, and he tried thereon, but the judgment is one finally disposing of the case, and thereto is added a judgment for costs against Sanderson.

The whole conduct of this case conflicts with *Selleck's* case, and our learned brothers of the bar will see it when their attention is called to portions of that opinion not appearing in their brief.

Section 960, Revised Statutes 1909, reads: "When the matter charged is not indictable, a trial of the facts alleged shall be had in the court in which the charges are pending, which trial shall be by the court."

We quoted this section in *Selleck's* case at 252 Mo. l. c. 383, and on page 383 said:

"This statute when added to those already quoted rounds out the statutory scheme. When so rounded out it means (1) that where the information in a disbarment proceeding charges an indictable offense, but does not charge a trial and conviction upon an indictment, then the power of the trial court is limited to a mere suspension of the attorney from practice until the facts can be ascertained in a trial of the facts on an indictment, but (2) if the 'matter charged is not indictable, a trial of the facts alleged shall be had in the court in which the charges are pending, which trial shall be by the court.'

"The very language of Section 960 shows that it was never contemplated that the court before which the disbarment proceedings were pending should ascertain the facts in a case where the charges reached the gravity of indictable offenses: The trial of such facts was left to the court having charge of the criminal proceedings, and by Section 959, the record from such court, whether it showed acquittal or conviction, is binding upon the court hearing the disbarment proceedings."

And further speaking of Section 960, *supra*, we said:

"Again had the Legislature intended that the court hearing the disbarment proceeding should hear, try and determine the facts, in a case where the charges amounted to indictable offenses, there never would have been the limitations found in Section 960 supra. That section limits the court's right to determine the facts to cases involving charges other than those of indictable offenses. The rule 'expressio unius est exclusio alterius' is peculiarly applicable here."

In other words there could be no final judgment, as we have here, until there had been an indictment and a trial thereon, and when there had been such trial the judgment of conviction or of acquittal was the thing which authorized the trial court to proceed beyond a temporary (not a fixed) suspension. The rule in *Selleck's* case goes to the extent of holding that, information in the disbarment proceedings charged against the attorney indictable offenses, the court hearing the disbarment proceeding was without power to hear and determine the facts, but must await their determination in the court having charge of the criminal charge. So when we read the petition for disbarment in this case, it is clear, as ruled in *Selleck's* case, that the trial court was without statutory authority to hear and determine even the facts upon which his judgment was based. By the statute (Sec. 960, R. S. 1909) that power was placed in another court, i. e. one having charge of the criminal charges mentioned in the petition of disbarment.

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The face of this record shows that under Section 960, *supra*, the court entering this judgment was without power or jurisdiction to enter it, or to hear and determine the facts upon which it was entered. The Legislature can limit the power and jurisdiction of circuit courts, and it has done so in this class of cases.

It is urged that Sanderson waived this by proceeding with the trial. There can be no waiver where the court is without power to hear and determine the facts.

There is another reason for a reversal of this judgment under our statutes as construed in *Selleck's case*. There was no legal proof upon which to base this final judgment (for upon its face it is a final judgment, and not a mere interlocutory order of suspension), pending the ascertainment of the facts in a court having criminal jurisdiction of the offenses charged in the petition for disbarment.

Where the petition for disbarment rests upon indictable offenses, the only proof which can justify a permanent disbarment, or a *fixed* term suspension, is a judgment of guilt from a court which heard the facts of the case upon indictment. Not only so, under the petition in this case the court below was not only precluded from finding the facts, but likewise precluded from entering a final judgment (as was entered here) until there had been an indictment and trial thereon. [R. S. 1909, sec. 959.]

This we ruled in *Selleck's case*, *supra*. For these reasons I concur with the opinion of Brother Woodson. All concur in these views except *Woodson, J.*, who adheres to the principal opinion, written by him.

THE STATE ex rel. CITY OF CARTHAGE v.
GEORGE E. HACKMANN, State Auditor.

In Banc, April 1, 1921.

1. **CITY INDEBTEDNESS: Maximum Limit: Last Previous Assessment.** The assessment mentioned in Section 12 of Article 10 of the Constitution limiting the indebtedness that a city of the third class may incur in any year to "five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness," means a complete assessment, and the words "previous to the incurring of such indebtedness" mean previous to the authorization of the indebtedness at the election held by the voters of the municipality. So that where the election was held on September 16, 1919, and the State Board of Equalization had not completed the equalization of the 1918 assessment and certified its action thereon previous to said September 16, 1919, the assessment of 1916 was the "next before the last assessment," and must be used as the measuring rod in determining whether the bonds authorized at such election, added to the city's then existing indebtedness, exceeded five per cent of the value of the taxable property therein.
2. ———: ———: **Existing Indebtedness: For City Waterworks.** In determining whether bonds authorized at an election to be issued by a city exceeds the five per cent of the value of the taxable property mentioned in Section 12 of Article 10 of the Constitution, existing indebtedness due to the issuance of bonds for the construction of municipal waterworks is not to be considered. In view of Section 12a and the amendment of said Section 12a adopted in 1920, the indebtedness authorized by said Section 12a for the purpose of constructing or purchasing waterworks, electric or other light plants, to be owned exclusively by the city, is not to be treated as a part of the existing indebtedness in determining the validity of a subsequent issue of bonds under the authority of Section 12 of Article 10. [Overruling State ex rel. Columbia v. Wilder, 197 Mo. 1.]
3. **CONSTITUTIONAL CONSTRUCTION.** The rules laid down by the courts for the construction of constitutional provisions are the same as those governing the construction of statutes.

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4. ———: Adoption of Judicial Construction: Subsequent Legislative Construction. It is a mere legal fiction that when the people adopted an amendment to a section of the Constitution they adopted the construction previously placed upon it by the Supreme Court; but the necessity of adopting that legal fiction is avoided by a legislative act, passed prior to the adoption of the amendment, which places a meaning on the constitutional provision different from that previously placed upon it by judicial construction.

Mandamus.

WRIT ISSUED.

Frank R. Birkhead for relator.

(1) The proper assessment to be used as a basis of determining the city's debt limit is that based upon the ownership as of June 1, 1917, and not that as of June 1, 1916, as contended by the respondent. The record shows that the 1918 assessment of Jasper County property was practically completed and certified to the county clerk prior to September 16, 1919, the date of the special bond election, although the State Board of Equalization had not actually adjourned. In fact the State Board did not finally adjourn until February 19, 1920. (2) In calculating its debt limit, the City of Carthage is entitled to exclude its outstanding bonds issued to construct its waterworks owned exclusively by the city. Sec. 12a, Art. 10, Mo. Constitution. This question was before this Court in 1906 in the case of State ex rel. City of Columbia v. Wilder, 197 Mo. 1. Judge VALLIANT, wrote the dissenting opinion, concurred in by Judges BRACE and LAMM, and his views are correct. The \$100,000 outstanding waterworks bonds was the only indebtedness of said city at the date of the special election on September 16, 1919. Therefore by excluding such indebtedness these street paving bonds are well within the five per cent limit. (3) The construction of a section or provision of the Constitution must not be so strict or technical as to defeat the evident objects and purposes of its creation. Missouri

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Loan Bank v. How, 56 Mo. 59; State ex rel. v. McGowan, 138 Mo. 187, 192; 25 Ruling Case Law, 1077; 12 C. J., 700.

(4) The act under which these street paving bonds were voted and issued expressly provides that cities in ascertaining their debt limits in issuing bonds under such act, may exclude outstanding waterworks bonds. Sec. 9256a, p. 570, Laws 1919. (5) The Fiftieth General Assembly proposed two constitutional amendments amending Sections 12 and 12a of Article 10, both of which were adopted by the people at the last general election. One of these amended said article by striking out Section 12 and adding a new section in lieu thereof, to be known as Section 12. The first ten lines of the new Section 12 are identical with the same part of the original section, the words "including existing indebtedness" being retained. This same General Assembly enacted the act above referred to (Laws 1919, pp. 569 to 572), which clearly excludes from the "existing indebtedness" the indebtedness of cities incurred under the provisions of Section 12a. It cannot reasonably be said that the law-makers intended that Section 12 requires cities to calculate their outstanding waterworks and light bonds as part of their "existing indebtedness" in the face of an act passed by the same body which expressly declares that such cities may disregard such bonds, in ascertaining their debt limit. 12 C. J. 714; Cook County v. Healey, 222 Ill. 310. The other amendment proposed and ratified, amended Section 12a so that said section now applies to all cities with less than 30,000 inhabitants, and provides further that such cities may become indebted in a larger amount than specified in Section 12, not exceeding an additional ten per cent of the value of taxable property therein for the purpose of purchasing or constructing waterworks, lighting plants and ice plants. Here again is seen the dominant idea and purpose of increasing the taxing power of cities that they might own these utilities.

Jesse W. Barrett, Attorney-General, and *Robert J. Smith*, Assistant Attorney-General, for respondent.

(1) The facts and figures appearing in relator's petition show that the indebtedness is in excess of the limit fixed by the Constitution of this State. Sec. 12, Art. 10, Mo. Constitution; State ex rel. v. Wab. Railroad, 251 Mo. 141; State ex rel. v. Gordon, 251 Mo. 309. (2) Petition shows upon its face that said bonds are null and void and should not be registered, and are in excess of limitation fixed by Section 12, Article 10 of the Constitution, and contrary to the provisions of Section 12a, Article 10, and are therefore invalid. State ex rel. City of Columbia v. Wilder, 197 Mo. 1; State ex rel. v. Wabash Railroad, 251 Mo. 141; State ex rel. v. Gordon, 251 Mo. 303. Section 9256a, p. 570, Laws 1919, is contrary to the provisions of the Constitution, and did not authorize this election as claimed by relator; it certainly could not be contended that the proposed amendment by the Fiftieth General Assembly amending Section 12 and 12a of the Constitution approved by the people at the last general election could affect the election of September 16, 1919. Sec. 12, Article 10, Mo. Constitution; Sec. 12a, Article 10, Mo. Constitution.

DAVID E. BLAIR, J.—On January 11, 1921, the City of Carthage as relator filed its petition for a writ of mandamus to compel respondent as Auditor of the State of Missouri to register bonds in the sum of \$150,000, authorized by the relator at a special election held September 16, 1919, for the purpose of paying a portion of the cost of paving in said city, as provided for by Laws of 1919 at pages 569 to 572 inclusive.

The regularity of the proceedings of said city in said election and the subsequent proceedings before the city council and the authority of such city to issue bonds of this character are not disputed. Respondent refused registration of said bonds on the ground that the issue of \$150,000, added to the then existing indebtedness of

relator city, exceeded the limit of indebtedness of said city as fixed by Section 12 of Article 10 of the Constitution.

Respondent waived the issuance of the alternative writ of mandamus, and filed his demurrer to the petition, thereby admitting the truth of all facts well pleaded in the petition. Further facts necessary to an understanding of the case will be set out in the opinion.

I. Relator contends that the amount of indebtedness it is authorized to incur under Section 12, Article 10, of the Constitution of Missouri, should be ascertained from and measured by the assessment of 1917, and not by the assessment of 1916. The provision of said section limits the indebtedness that relator and other cities may incur in any year to "five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness." The assessments mentioned in this section mean completed assessments. [State ex rel. City of Dexter v. Gordon, 251 Mo. 303; State ex rel. v. Wabash, 251 Mo. 134; Steinbrenner v. St. Joseph, 226 S. W. 890.] The clause "previous to the incurring of such indebtedness" means previous to the authorization of the indebtedness in the election held by the voters of the municipality. [State ex rel. City of Dexter v. Gordon, *supra*; Steinbrenner v. St. Joseph, *supra*.] The State Board of Equalization had not completed the equalization of the 1918 assessment and certified its action thereon previous to September 16, 1919, the date of the election, and hence the assessment of 1916 was the "next before the last assessment," and must be used as the measuring rod.

II. The total indebtedness of the City of Carthage existing and outstanding on September 16, 1919, was \$100,000. The value of the taxable property in said city as determined by the assessment of 1916 was \$3,602,153.48, and five per cent thereof was \$180,107.67. If the \$100,000

**Last
Previous
Assessment.**

**Allowable
Indebtedness.**

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existing indebtedness, which is due to the issuance of bonds for the construction of municipal waterworks, is considered as part of the existing indebtedness, mentioned in Section 12, of Article 10, limited to five per cent of the taxable property, the issue of \$150,000 of paying bonds involved in this case is clearly invalid, because it contemplates a bonded indebtedness of \$250,000, or an excess of \$69,992.33.

In the case of State ex rel. City of Columbia v. Wilder, 197 Mo. 1, hereinafter referred to as the Columbia

Columbia Case.

Case, the facts were almost identical with those in the instant case, and the decision was adverse to the claims of the City of Columbia. It doubtless was because of the controlling authority of that case that respondent refused to register the bonds of the city of Carthage. In the Columbia Case the facts were that the city had an existing indebtedness of \$140,700, of which \$110,000 was issued and sold for the purpose of paying for the waterworks and electric light plant. An additional debt of \$10,000 for the purpose of constructing sewers was authorized by election and subsequent city ordinances. The State Auditor refused registration, as here. Five per cent of the value of the taxable property of the City of Columbia was found to be \$123,102.50, so that the total indebtedness, including the bonds issued for waterworks and electric light plant purposes, exceeded such five per cent.

The contention made by the City of Columbia was that, in view of the amendment of the Constitution designated as Section 12a of Article 10, the \$110,000 waterworks and electric light plant bonds should not be considered as part of the existing indebtedness, which cannot exceed five per cent., as provided in Section 12 of Article 10, but should be regarded as falling within the additional five per cent allowance at that time provided by Section 12a, Article 10. Treated thus, the proposed sewer bonds would not have created an excessive indebtedness, and the issue would have been held to be valid. Under that state of facts the court held that the \$10,000 issue of sewer

bonds was excessive because the outstanding waterworks and electric light plant bonds must be considered as part of the existing indebtedness mentioned in Section 12, Article 10. The issue for sewer purposes was therefore void, and the peremptory writ was denied. That decision was rendered by a divided court. GANTT, J., wrote the majority opinion, in which BURGESS, FOX, and GRAVES, JJ., concurred, and VALLIANT, J., wrote the dissenting opinion, in which BRACE, C. J., and LAMM, J., concurred.

The dissenting opinion of VALLIANT, J., held that the constitutional amendment, Section 12a of Article 10, was adopted for the purpose of increasing the taxing powers of the cities embraced in its terms, to enable them to acquire their own waterworks and electric light plants, and the order in which the city might increase the indebtedness was overlooked and not thought of by the General Assembly in submitting the amendment, and was immaterial and unimportant.

It necessarily follows, and relator candidly admits, that if the holding in the Columbia Case is adhered to the peremptory writ must be denied in this case. But relator urges the unsoundness of the conclusion reached by the majority of the judges in the Columbia Case, and asks that we again review the matter.

There are certain well-understood rules laid down by the courts for the construction of constitutional provisions, and they are the same as those governing legislative enactments.

It was said in *State ex rel. v. McGowan*, 138 Mo. l. c. 192, in discussing the general rules of construction of constitutional provisions that: "The organic law is subject to the same general rules of construction as other laws, due regard being had to the broader objects and scope of the former, as a charter of popular government. The intent of such an instrument is the prime object to be attained in construing it."

In 12 *Corpus Juris*, 700, it is said: "The court, therefore, should constantly keep in mind the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied."

And also in 12 Corpus Juris, 702, it is said: "If a literal interpretation of the language used in a constitutional provision would give it an effect in contravention of the real purpose and intent of the instrument as deduced from a consideration of all its parts, such intent must prevail over the literal meaning."

It can hardly be disputed that, under the limitation fixed by Section 12, Article 10, the average city was not able to issue bonds for waterworks and electric light plants in addition to indebtedness created for the erection of a city hall, fire-fighting apparatus, jail, sewers, and other very proper objects of extraordinary municipal expenditures. There were few growing cities that had not used their authority to create bonded indebtedness to such an extent as to forbid them engaging in the ownership and operation of municipal light and water utilities. A demand arose for the extension of municipal activity into this field, and this, no doubt, led to the submission and adoption of Section 12a of Article 10, for the purpose of increasing the debt-making or taxing power of such cities to enable them to engage in municipal ownership of such utilities.

The construction adopted in the Columbia Case makes it impossible to issue bonds for city halls, jails, fire-fighting apparatus, sewers, city paving, and other very proper purposes in cities which had first authorized bonds for light and water plants. It also prevents those cities, which had existing indebtedness under the constitutional limit under Section 12, Article 10, and thereafter voted additional bonds under Section 12a, Article 10, for water and light plants, from voting bonds for any other purpose until the water and light bonds are paid off below the five per cent limitation fixed by Section 12, Article 10, notwithstanding every dollar of the debt for other purposes existing at the time the water and light bonds were issued has been paid off.

An amendment to Section 12a, Article 10, submitted and adopted in 1920, extended the operation of that section to all cities of less than 30,000 population, increased

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the limit for incurring indebtedness from five per cent of the taxable property value in such cities to ten per cent, and included the purchase or construction of ice plants as an additional use for such increased debt-making or taxing power. The adoption of said amendment only emphasizes the difficulties under which cities will labor in the future if they are shackled by further adherence to the rule laid down in the Columbia Case. Any city that hereafter authorizes bond issues for waterworks, ice plants, and light plants to its full capacity cannot issue an additional dollar of bonds for any other municipal purpose until not only all existing indebtedness for other purposes has been paid, but also until such time as more than half its water and light plant bonds have been retired. In other words, the existence of outstanding bonds for light and water plants constitutes a positive obstruction in the path of city growth and development along other lines. To the extent they are availed of the provisions of Section 12a, Article 10, destroy the benefits of Section 12, Article 10. The framers of the Constitution surely cannot be said to have intended any such harsh and narrow construction as this. In construing the section the court should not adopt such construction, unless no other construction can be arrived at from the language used.

It may be urged that when the people adopted the amendment to Section 12a, Article 10, in 1920, they also adopted the construction placed on Section 12 and Section 12a by this court in the Columbia Case. Of course, this is merely a legal fiction. Probably not one voter in a hundred who voted for the amendment had any actual knowledge of what this court decided in the Columbia Case. While it will not be contented that it is competent for the Legislature to put a construction on a provision of the Constitution in conflict with the construction of this court, it is more reasonable to suppose that the voters in the 1920 election were familiar with the directly opposite construction of Section 12, article 10, made by the General Assembly in 1919, than they were with the construction of this court 14 years before the election was held.

"It is an established rule of construction that, where a constitutional provision has received a settled judicial construction, and is afterwards incorporated into a new or revised constitution, it will be presumed to have been retained with a knowledge of the previous construction, and courts will feel bound to adhere to it. Prior legislative construction is likewise presumed to have been adopted by subsequent adoption of the provision so construed." [12 Corpus Juris, 717.]

"If the meaning of the Constitution is doubtful, a legislative construction will be given serious consideration by the courts. . . . A contemporaneous legislative exposition of a constitutional provision is entitled to great deference." [12 Corpus Juris, 714.]

The law under which relator issued the bonds here in question was enacted in 1919, and, to avoid their invalidity under the construction in the Columbia Case, provides:

"Such bonds when authorized by ordinance shall not exceed including existing indebtedness five per cent of the assessed valuation of the taxable property in said city to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness, except that any indebtedness incurred under the provisions of Section 12a of Article 10 of the Constitution of the State of Missouri shall not be considered in construing this section." [Laws 1919, p. 570.]

The existence of the recent legislative construction at least avoids the necessity of assuming that the 1920 amendment adopted the construction in the Columbia Case.

It may be that a strict and technical construction of the language of Section 12a, Article 10, justifies the conclusion reached in the Columbia Case that indebtedness authorized by Section 12a, Article 10, should be treated as part of the existing indebtedness in determining the validity of subsequent issuance of bonds under authority of Section 12, Article 10, but such construction

waives aside all considerations based on the history of the difficulties confronting the municipalities, and gives no weight or importance to the real object and purpose of the amendment, and absolutely destroys its beneficial and remedial office. It is not a necessary conclusion that the clause "including existing indebtedness," found in Section 12, be construed to include bonds issued under authority of Section 12a.

We think the dissenting opinion in the Columbia Case is sound. We quote with approval two paragraphs therefrom as follows:

"It is thought, however, that because the waterworks bonds were issued first, that power is exhausted, and that is so if we take the water bonds into this account, because counting those bonds the original five per cent limit has been passed, and the bonds now to be issued are not for the purpose expressed in the amendment. But we do not think that the accidental fact that the water bonds were issued first will deprive the city of the privilege the amendment of 1902 was intended to confer. The purpose—the main purpose—the only purpose of the amendment of 1902, was to increase the taxing power of the cities embraced in its terms to enable them to own their waterworks and lighting plants; that is what the General Assembly had in mind when it proposed the amendment, and it is what the people had in mind when they adopted it. The conferring of taxing power was the dominant thought in the amendment, the order in which the city might incur its obligations was overlooked, was not thought of, it was of no importance, and at most it can now be deemed as an accident of only secondary consideration, yet if we should adopt the strict literal construction contended for by the respondent we would allow the altogether unimportant accidental fact to defeat the main purpose of the amendment. That would be misconstruction. When there is a seeming conflict between the dominant purpose and an unimportant or secondary consideration, the dominant idea must prevail.

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"We construe Section 12 and 12a of Article 10 of the Constitution, taken together, to mean that when the amount of indebtedness that the city may incur under the terms of Section 12 is to be estimated, the amount of its indebtedness incurred since the amendment and within the extra five per cent limit of Section 12a, incurred 'for the purpose of purchasing or constructing water-works, electric or other light plants, to be owned exclusively by the city so purchasing or constructing the same,' is not to be taken into the estimate."

It follows that the case of *State ex rel. City of Columbia v. Wilder*, 197 Mo. 1, should not longer be adhered to, and should be overruled, and that this court should issue its peremptory writ of mandamus, requiring the registration of the bonds issued by relator. It is so ordered. *Walker, C. J.*, and *J. T. Blair, Higbee, and Elder, JJ.*, concur; *Graves, J.*, dissents, and adheres to views in case of *State ex rel. City of Columbia v. Wilder*, 197 Mo. 1; *Woodson, J.*, dissents.

CHRIST H. ASEL, Appellant, v. CITY OF JEFFERSON et al.

In Banc, April 1, 1921.

1. **CONSTITUTIONAL LAW: Title: Construction.** The constitutional provision requiring the subject of a law to be clearly expressed in its title must be reasonably and liberally construed and applied, due regard being had to its object and purpose, the principal purpose being to prevent surprise and fraud upon the members of the General Assembly by barring the insertion of matter in the body of the bill of which the title gives no intimation.
2. ———: ———: **Subject: General.** So long as the title to a law does not cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection, it is not subject to an objection for generality.
3. ———: ———: ———: **Reference to Prior Statute.** The mere reference in the title of an act to a previous act, without other description of the subject-matter, gives notice that the new section

to be enacted will deal with the same subject contained in the section to be repealed. So that where the title of the Act of 1915 was, "An Act to amend Chapter 84, Article 4, of the Revised Statutes of the State of Missouri, 1909, in relation to municipal corporations, by adding thereto a new section to be known as Section 9237a," the title to the Act of 1919, which was, "An Act to repeal 'An Act to amend Chapter 84, Article 4, of the Revised Statutes of Missouri, 1909,' in relation to municipal corporations as it appears in the Laws of Missouri, 1915, at page 359, and approved March 24, 1915, and to enact a new section in lieu thereof to be known as Section 9237a," did not violate the constitutional provision requiring the subject of a law to be clearly expressed in its title, although the Act of 1915 provided only for the sprinkling and oiling of streets, and the Act of 1919, in addition to providing for the sprinkling and oiling of streets, provided for their repairing, surfacing and re-surfacing.

4. ———: ———: ———: ———: **Caption or Head-Note of Prior Act.** By the title of said Act of 1919 the members of the Legislature were informed that the bill related to municipal corporations and proposed to repeal an act amending Chapter 84 of Article 4 of the Revised Statutes of 1909, appearing in the Laws of 1915, at page 359, and to enact a new section in lieu thereof, and by reference thereto their attention was directed to said Act of 1915; and by turning to the Act of 1915, they would have found its caption or head-note to be: "Municipal Corporations—Cities of the Third Class—Oiling and Sprinkling Streets—Special Tax Bills," which, for the purposes of such reference, became a part of the title to the Act of 1919, then under consideration, and they would thereby have been specifically informed as to the general subject and nature of the legislation sought to be enacted by the Act of 1919; and since the caption or head-note of the Act of 1915 referred to the "oiling and sprinkling of streets," the legislators, by referring to it, would readily have realized that the subject of the new section to be enacted by the proposed Act of 1919 would necessarily relate to the care and maintenance of streets, a subject closely related thereto; and since the body of the Act of 1919 continued to treat of the "oiling and sprinkling" of streets, together with the kindred subject of "repairing, surfacing and re-surfacing" thereof, it cannot be held that the Legislature was misled by the title of the Act of 1919, or that said title did not give notice that the body of the Act of 1919 would contain additional provisions for repairing, surfacing and re-surfacing of streets.
5. ———: ———: **Congruous Subjects.** The "repairing, surfacing and re-surfacing" of streets are cognate and related to the "oiling and sprinkling" of streets.

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6. **CONFLICTING STATUTES: Resurfacing and Reconstruction of Streets: Later Enactment: Remonstrance.** Although the Act of 1919 conflicts with Sections 9254 and 9255 of the Act of 1911, Laws 1911, page 337-341, since the two acts provide for an entirely different method of procedure as to the paving and resurfacing of streets, and in that respect are inconsistent and both cannot operate together, yet the Act of 1919, being a later enactment, necessarily repeals the Act of 1911, and proceedings for resurfacing a street based on the Act of 1919 are not invalid because of said conflict, notwithstanding the Act of 1911 makes provision whereby resident owners may protest against any proposed paving while the Act of 1919 contains no such provision.
7. **STREET IMPROVEMENT: Unequal Assessment.** Proceedings for the improvement of a street are not, invalid because all property owners will be charged the same amount per front foot, regardless of whether the street in front of the particular property is entirely resurfaced or only holes or depressions therein are patched, the proposed contract being for the whole improvement, and the cost to be defrayed by a special tax bill on the property fronting or abutting on the streets where the work is done, in the proportion that the linear feet of each lot fronting thereon bears to the total number of linear feet of all property chargeable with the cost. All property in the improvement district is benefited alike and all should bear proportionately the cost, without regard to what particular work is done in front of a given lot; and there is no such unequal assessment as renders the proceeding invalid.
8. ———: **Tax Bills to Contractor.** Under the Act of 1919 special tax bills for the re-surfacing of a street may be issued directly to the contractor doing the work, or to the city and by it assigned to the contractor.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate,*
Judge.

AFFIRMED.

Pope & Lohman for appellant.

(1) The proceedings are based upon Section 9237a of the Act of 1919, Laws 1919, p. 572. This act repeals the Act of 1915. Laws 1915, p. 359. The Act of 1915 provides for only sprinkling and oiling. The Act of 1919, repealing the 1915 Act and enacting a new

section in lieu thereof, known as 9237a, in addition to sprinkling and oiling, provides that streets may be repaired, surfaced and re-surfaced, while no mention of the repairing, surfacing and re-surfacing thereof appears in the title. The real subject of the legislation is not clearly expressed in its title; and does not indicate to the people in clear terms the general contents of the bill, but on the contrary, shows a design to mislead and keep from the people the real subject of the legislation. It is unconstitutional so far as it relates to repairing, surfacing and re-surfacing streets. Sec. 28, Art. 4, Mo. Constitution; *State v. McEniry*, 269 Mo. 228; *Woodwear Hardware Co. v. Fischer*, 269 Mo. 276; *State ex rel. v. Revelle*, 257 Mo. 538; *Williams v. Railroad*, 233 Mo. 676; *State ex rel. v. Heege*, 135 Mo. 112; *State ex rel. v. County Court*, 102 Mo. 531; *State ex rel. Greene County v. Gideon*, 210 S. W. 358. (2) Section 9237a provides that streets may be repaired, surfaced and re-surfaced, at the cost of the property owners, without an opportunity to protest, and is directly contrary to Sections 9254, 9255 and 9256, R. S. 1909, as amended by Laws 1911, pages 337-341, in which it is provided by Section 9254, that "repaired as here used shall not include an improvement where the entire surface of a paving is renewed, but such renewals shall be considered paving," and by which it is provided by Section 9255 that, before the council shall be authorized to pave any street, they shall declare by resolution such improvement necessary, and cause the resolution to be published in a newspaper in the city, and if no sufficient protest is made, then the council shall have power to cause the improvement to be made. *Ranney v. Cape Girardeau*, 185 Mo. App. 229; Sec. 9237a, Laws 1919, p. 572; Secs. 9254, 9255 and 9256, Laws 1911, pp. 337, 341; *State ex rel. Major v. Amick*, 247 Mo. 290; *State ex rel. Gregory v. Brodie*, 161 Mo. App. 545. (3) Under the proceedings contemplated, there will be an equal assessment for an unequal amount of work. Improvements made under Specification No. 1 provide for the re-surfacing of the entire street, while

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under Specification No. 2, only holes or depressions shall be patched, all property owners paying the same amount per front foot, regardless of the improvement made in front of their property. (4) Under the present proceedings and the notice to paving contractors, the contractor is to be paid with special tax-bills, issued in favor of the contractor. There is no authority under Section 9237a, Laws 1919, authorizing tax-bills to issue to the contractor, or to pay the contractor in tax-bills. The city must do the work and issue tax-bills in its own name, and has no authority to pay the contractor with tax-bills issued to him.

Leonard M. Rice and Vance J. Higgs for respondent.

(1) The Act of 1919 does not violate Section 28 of Article 4 of the Constitution. *State ex rel. v. Gordon*, 261 Mo. 639; *State ex rel. v. Williams*, 232 Mo. 56, 75; *State v. Brodnax*, 228 Mo. 25, 53; *State ex rel. v. Vandiver*, 222 Mo. 206, 219; *State ex. inf. v. Herring*, 208 Mo. 708; *State ex inf. v. Jockey Club*, 200 Mo. 56; *O'Connor v. Transit Co.*, 198 Mo. 622, 633; *State v. Doerring*, 194 Mo. 398; *Elting v. Hickman*, 172 Mo. 251; *State v. Bixman*, 162 Mo. 16; *St. Louis v. Weitzel*, 130 Mo. 614; *State ex rel. v. Bronson*, 115 Mo. 275; *State v. Morgan*, 112 Mo. 212; *State ex rel. v. Miller*, 100 Mo. 444; *Ewing v. Hoblitzelle*, 85 Mo. 64; *State v. Miller* 45 Mo. 495. The purposes of the act are clearly expressed in its title. *State ex rel. v. Roach*, 258 Mo. 561; *State ex rel. v. Assurance Co.*, 251 Mo. 244; *State ex rel. v. Weithaupt*, 231 Mo. 294; *State v. Distilling Co.*, 236 Mo. 294; *State ex rel. v. Vandiver*, 222 Mo. 206; *State v. Cantwell*, 179 Mo. 260; *State v. Bengsch*, 170 Mo. 105; *City of St. Louis v. Tiefel*, 42 Mo. 578; *State v. Mathews*, 44 Mo. 523; *State v. Miller*, 45 Mo. 495; *Hannibal v. County of Marion*, 69 Mo. 571; *State ex rel. v. Mead*, 71 Mo. 268. (2) The Act of 1919 is not in conflict with Section 30 of Article 2 of the Constitution. *Embree v. Road Dis.*, 257 Mo. 611; *Hager v. Reclamation Dist.*, 111 U. S., 701; *Springfield ex rel. v.*

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Weaver, 137 Mo. 672; Bank v. Carswell, 126 Mo. 436; Kansas City v. Huling, 87 Mo. 203; St. Louis v. Richeson, 76 Mo. 470. (3) The Act of 1919 is not in direct conflict with Section 9254, Revised Statutes 1909. A canon of construction of statutes is to get at the intent of the Legislature and to give force and effect to this intent. Curtis v. Section, 252 Mo. 245; State ex rel. v. Gmelich, 208 Mo. 152; Kenney v. McVoy, 206 Mo. 42; Grimes v. Reynolds, 184 Mo. 679. Statutes relating to the same subject must be treated prospectively and construed together as though they constituted one act. State ex inf. v. Koelen, 270 Mo. 191; State ex inf. v. Standard Oil Co., 218 Mo. 355; Sales v. Paving Co., 166 Mo. 671. If there is, however, an irreconcilable conflict between Section 9254 and this act, the act, being subsequent legislation and a special provision, must prevail. State ex rel. v. Foster, 187 Mo. 611; State v. Green, 87 Mo. 587; State v. DeBar, 58 Mo. 395. (4) The ordinances questioned do not admit of an unequal assessment of benefits. Ruecking Const. Co. v. Withnell, 269 Mo. 556; Land Co. v. Kansas City, 241 U. S. 419; Wagner v. Baltimore, 239 U. S. 217; Houch v. Drainage Dist., 239 U. S. 254; French v. Paving Co., 181 U. S. 343; Webster v. Fargo, 181 U. S. 395; Municipal Sec. Co. v. Met. St. Ry. Co., 196 S. W. 400. (5) The city, under the provisions of the Act of 1919, has authority to issue tax-bills to itself and assign the same to the contractor, or to issue such tax-bills directly to the contractor. Sec. 8301, R. S. 1919.

ELDER, J.—This is an equitable action wherein plaintiff (appellant herein) seeks to enjoin defendants from contracting for the sprinkling, oiling, repairing, surfacing and re-surfacing of certain streets in Jefferson City, Missouri.

Respondent having agreed to appellant's statement of the facts, we adopt the same, with some slight modifications.

On February 9, 1920, the city council of the said City of Jefferson passed an ordinance dividing the city

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into six sprinkling, oiling, repairing, surfacing and re-surfacing districts, one of which is known as District No. 4, and established the boundaries thereof.

Plaintiff is a citizen and resident of the City of Jefferson, owning real estate in said District No. 4, fronting 48 feet on Madison Street and 98 feet on Ashley Street.

On May 7, 1920, the city council of said city passed an ordinance providing for the sprinkling, oiling, repairing, surfacing and re-surfacing of certain streets within the limits of District No. 4, by the terms of which the streets upon which plaintiff's property abuts, were proposed to be improved. The city engineer was instructed to prepare plans and file the same with the city clerk and advertisements for bids for the work were authorized. It was provided in said ordinance that the costs of sprinkling, oiling, repairing, surfacing and re-surfacing should be defrayed by special tax to be assessed in favor of the City of Jefferson on the property fronting on or abutting the streets improved, in proportion that the lineal feet of each lot fronting or bordering on the improvement bears to the total number of lineal feet of all property chargeable with the tax aforesaid, in the territory embraced by the contract for which advertisement was directed to be made.

Two specifications were made by the city engineer, one for re-surfacing the streets as an entirety, and the other for patching holes and depressions. The city engineer testified that under Specification No. 1, they proposed to scarify the streets and give them surface treatment, where they were too far gone to be retreaded under Specification No. 2, and that under Specification No. 2 they proposed to fill the holes with a bituminous concrete mixed.

After the specifications were filed, due notice was given to contractors, which was duly published according to law. The Pope Construction Company, a partnership composed of Joseph Pope and F. J. Kersting, submitted the lowest bid for the work proposed to be done,

108,133 square yards, at \$0.321 per square yard, amounting in all to \$34,724.80, which sum the city engineer testified would not exceed sixty cents per front foot on the streets proposed to be improved.

The bid of the Pope Construction Company was accepted by the city council, by resolution adopted July 6, 1920, and the mayor of the city was authorized by the council to enter into a contract with the Pope Construction Company for the faithful performance of the contemplated work.

Before the contract was entered into the plaintiff herein gave notice to defendants of his intention to file an application for an injunction on the 13th day of July, 1920, and on said 13th day of July he filed his petition and exhibits and a temporary injunction was granted, enjoining the defendants from proceeding further in any way from entering into the contract for sprinkling, oiling, repairing, surfacing and re-surfacing the streets within District No. 4, as provided in the city ordinances.

The petition for injunction recites that the city council of the City of Jefferson in attempting to establish the sprinkling, oiling, repairing, surfacing and re-surfacing district and providing for the improvement thereof, was acting under the provision of an act of the Missouri Legislature, approved May 29, 1919, entitled, "An Act to repeal 'An act to amend chapter 84, article 4, of the Revised Statutes of the State of Missouri, 1909,' in relation to municipal corporations as it appears in the Laws of Missouri 1915, at page 359, and approved March 24, 1915, and to enact a new section in lieu thereof to be known as Section 9237a;" that said act is unconstitutional and void and in violation of Section 28, Article 4 of the Missouri Constitution; that it is in conflict with and contrary to Sections 9254, 9255 and 9256, Revised Statutes 1909, as amended by Laws of Missouri, 1911, pp. 337-341; that the City of Jefferson, its officers and agents, were acting without authority of law and will cast a cloud upon the title to plaintiff's real estate, with

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a pretended lien for street improvement, under and by virtue of illegal acts, and deprive plaintiff and those similarly situated of their property without due process of law, contrary to Section 30 of Article 2 of the Constitution of Missouri; and that said city proposes to create a lien for the work and improvements in favor of the City of Jefferson, instead of the contractor, who does the work.

The defendants answered, admitting that plaintiff was the owner of property in District No. 4, and a citizen of the City of Jefferson, and admitting the existence of all the ordinances and proceedings of the council, but denied that the provisions thereof would cast a cloud upon plaintiff's title to his real estate and denied that they were illegal, or would deprive plaintiff of his property without due process of law, and denied that said act of the General Assembly of 1919 is contrary to other pre-existing laws of the State of Missouri. The answer practically admits all the facts stated in plaintiff's petition, but denies the legal effect thereof.

After the filing of the answer, defendants filed a motion to dissolve. The case was tried on July 24, 1920, and the court dissolved the temporary injunction theretofore granted. On the same day plaintiff filed a motion for rehearing and review and a motion in arrest of judgment, both of which were overruled, to which plaintiff excepted, and an appeal was granted to this court.

I. Plaintiff's first contention is that the act upon which the establishment and proposed improvement of the district in question is based, being Section 9237a, Laws of Missouri 1919, pages 572, 573, approved May 29, 1919, (now Section 8301, R. S. 1919), is violative of

**Title
of Act.**

Section 28, Article 4 of the Constitution of Missouri, in that the subject of the act is not clearly expressed in the title thereof. Learned counsel for plaintiff argue that this act repealed an act approved March 24, 1915, Laws of Missouri 1915, pages 359, 360, providing for the sprinkling and oiling of streets, and enacted a new section in lieu thereof; that the said Act

of 1919, in addition to providing for the sprinkling and oiling of streets, also provides that the same may be *re-paired, surfaced and re-surfaced*, but that "no mention of the *repairing, surfacing and re-surfacing* thereof appears in the title," and that therefore so far as the act relates to *repairing, surfacing and re-surfacing* it is unconstitutional.

In approaching the question presented, we do so with full recognition of the rule that the constitutional provision as to the necessity of clearly expressing the subject of a law in the title thereof must be reasonably and liberally construed and applied, due regard being had to its object and purpose.

As has been declared, the principal purpose of the provision was to prevent surprise or fraud upon the members of the Legislature by barring the insertion of matter in the body of the bill of which the title gave no intimation. [City of St. Louis v. Tiefel, 42 Mo. l. c. 590; State ex rel. v. Ranson, 73 Mo. 78; State v. Doerring, 194 Mo. l. c. 412; State v. Cantwell, 179 Mo. l. c. 260.] Also, as said by SHERWOOD, J., in St. Louis v. Weitzel, 130 Mo. l. c. 616: "The evident object of the provision of the organic law relative to the title of an act was to have the title like a guide board, indicate the general contents of the bill, and contain but one general subject which might be expressed in a few or a greater number of words. If those words only constitute one general subject; if they do not mislead as to what the bill contains; if they are not designed as a cover to vicious and incongruous legislation, then the title can stand on its own merits, is an honest title and does not impinge on constitutional prohibitions." Furthermore, so long as the title does not cover legislation incongruous in itself, and which by no fair intentment can be considered as having a necessary or proper connection, it is not subject to objection for generality. [City of St. Louis v. Tiefel, 42 Mo. l. c. 592; Lynch v. Murphy, 119 Mo. 163.]

With these general principles in mind, and passing to a minute consideration of the question before us, we

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find the title to the Act of 1915 to be as follows: "An act to amend Chapter 84, Article 4, of the Revised Statutes of the State of Missouri, 1909, in relation to municipal corporations, by adding thereto a new section to be known as Section 9237a." The title to the Act of 1919 is as follows: "An act to repeal 'An act to amend Chapter 84, Article 4, of the Revised Statutes of the State of Missouri, 1909,' in relation to municipal corporations as it appears in the Laws of Missouri, 1915, at page 359, and approved March 24, 1915, and to enact a new section in lieu thereof to be known as Section 9237a." The mere reference, in the title of the Act of 1919, to the Act of 1915, without other description of the subject-matter, under the rulings of this court gave sufficient notice that the new section to be enacted would deal with the same subject as contained in the section of the Act of 1915 to be repealed. [State ex rel. v. Imel, 242 Mo. 1. c. 303; State ex rel. v. County Court, 128 Mo. 1. c. 440; State ex rel. v. Heege, 135 Mo. 1. c. 118; Burge v. Railroad, 244 Mo. 1. c. 87; City of St. Louis v. Tiefel, 42 Mo. 578.] Moreover, by the title of the Act of 1919, the members of the Legislature were informed that the bill related to municipal corporations and proposed to repeal an act amending Chapter 84, Article 4, of the Revised Statutes of 1909, appearing in the Laws of 1915, at page 359, and to enact a new section in lieu thereof. By reference thereto, their attention was directed to the Act of 1915. Upon turning to the Act of 1915, the legislators would find the caption or head-note: "Municipal Corporations—Cities of the third class—Oiling and sprinkling of streets—Special tax bills," which by reference thereto became a part of the title to the Act of 1919, under consideration by them. [Barnes v. Pikey, 269 Mo. 398; State v. Doerring, 194 Mo. 1. c. 412; State ex rel. v. Ranson, 73 Mo. 1. c. 88; State v. Murlin, 137 Mo. 1. c. 305.] They would thereby be specifically informed as to the general subject and nature of the legislation sought to be enacted. The caption or headnote to the Act of 1915, having reference to the "oiling and sprinkling of streets," they would readily

realize that the subject of the new section to be enacted would necessarily relate to the care and maintenance of streets, or a subject closely related thereto. And the body of the Act of 1919, continuing to treat of the "oiling and sprinkling" of streets, together with the kindred and germane subjects of "repairing, surfacing and re-surfacing" thereof, manifestly it cannot be effectively urged that the Legislature was misled.

Were the subjects incongruous or disconnected, or had they no natural connection with each other, plaintiff might well contend that the act was violative of the section of the Constitution cited, in that it contained more than one subject. But neither can that insistence prevail. By a fair interpretation the matters of "repairing, surfacing and re-surfacing" are cognate and related to the other subject-matter of the act and are accordingly not vulnerable to the objection that they constitute a separate and distinct subject. [State ex inf. v. Delmar Jockey Club, 200 Mo. 34; State v. Brodnax and Essex, 228 Mo. 25; State ex rel. v. Williams, 232 Mo. 56; O'Connor v. Transit Co., 198 Mo. 622; State ex rel. v. Gordon, 261 Mo. 631; State ex rel. v. Miller, 100 Mo. 439; Elting v. Hickman, 172 Mo. 237; Ewing v. Hoblitzelle, 85 Mo. 64.]

Our conclusion is that the Act of 1919 is in entire harmony with Section 28, Article 4, of the Constitution of this State, and we so rule. [State v. Doerring, 194 Mo. 398; State ex rel. v. Imel, 242 Mo. 293; Barnes v. Pikey, 269 Mo. 398; State ex rel. v. Ranson, 73 Mo. 78.]

II. Plaintiff next contends that the Act of 1919 is in direct conflict with Sections 9254 and 9255, Laws of Missouri 1911, pages 337-341. The Act of 1919 relates to the sprinkling, oiling, repairing, surfacing and *resurfacing* of streets, avenues, alleys and public places.

Sections 9254 and 9255 relate to the grading, *paving*, grading, guttering and curbing, and alleys, the *reconstruction and repairing of paving*, grading, guttering and curbing, and the making and repairing of sidewalks, bridges, culverts

**Conflict
With Other
Statutes.**

and crosswalks. Section 9254 provides that "where the entire surface of a paving is renewed," such renewal "shall be considered as a paving." By Section 9255 provision is made whereby resident owners may protest against any proposed paving, but not so under the Act of 1919. Learned counsel for plaintiff argue that "under the proposed improvement in the case at bar, it is clear that the work contemplated is to renew the entire surface of the street (See Specification No. 1), and constitutes a paving, against which property owners have the right to protest, which was denied them under the proposed improvement in the case at bar." Specification No. 1, referred to by counsel, which was introduced in evidence, provides in general that the "present wearing of the roadway" shall be loosened by means of a scarifier or by hand labor to a depth of not less than three inches; that the roadway "shall be thoroughly harrowed several times until a maximum density is obtained;" that it shall then be "shaped to the proper crown and grade as shown on the plans and profile or as directed by the engineer;" that all surplus material shall be removed and "such additional stone as may be required to bring the roadway to the proper grade" shall be furnished by the contractor; that the surface shall then be thoroughly rolled until an even and firm surface is produced, when it shall be cleaned of all dust, dirt and excess material; that to the surface so prepared there shall be applied a coat of tarvia, which shall be allowed to stand at least twenty-four hours; that over this surface shall then be spread "a sufficient quantity of torpedo gravel to fill the surface voids," after which the roadway shall be lightly rolled and swept clean; and that thereupon a second or final application of tarvia shall be made. From this specification it clearly appears that the entire surface of the street is to be renewed (as is argued by counsel), which character of improvement is defined by Section 9254 to be a "paving." However, the improvement also constitutes a "resurfacing" within the meaning of the Act of 1919. [Collins v. Jaicks Co., 279 Mo. l. c. 427,

214 S. W. l. c. 398.] It follows that the two acts, providing for an entirely different method of procedure as to the paving and re-surfacing of streets respectively, are in that respect so inconsistent and repugnant that they both cannot operate together. But, the Act of 1919, having been enacted subsequent to the Act of 1911, necessarily repeals the latter. [State ex rel. v. Shields, 230 Mo. l. c. 100; Gasconade County v. Gordon, 241 Mo. l. c. 582; State ex rel. v. Clayton, 226 Mo. l. c. 302; State ex rel. v. Heidorn, 74 Mo. 410; State ex rel. v. Draper, 47 Mo. 29; State ex rel. v. Lawrence, 38 Mo. l. c. 535.] Accordingly, even though plaintiff's contention is well founded, nevertheless, the proceedings in the instant case having been based on the Act of 1919, which is controlling, are valid.

III. Plaintiff further insists that under the proceedings contemplated, there will be an unequal assessment in that all property owners will be charged the same amount per front foot, regardless of whether the street in front of the particular property is entirely re-surfaced or only holes or depressions therein are patched. This argument, although advanced in a different form, is the same as has often been made against the constitutionality of assessments of the character here presented, a question which has long been settled by this court and the Supreme Court of the United States.

In the instant case the proposed contract is for the whole improvement, and the cost thereof is to be defrayed by a special tax on the property fronting or abutting on the streets where the work is done, in the proportion that the linear feet of each lot fronting thereon bears to the total number of linear feet of all the property chargeable with the tax. All property in the improved district is to be benefited alike and all should bear proportionately the cost of the improvement, without regard to what particular work is done in front of a given lot. As was held in *Paving Co. v. Munn*, 185 Mo. 565, "it was clearly within the municipal authority to determine what street improvement and the extent

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thereof should be made and what property would be benefited thereby and to fix the benefit district and apportion the tax." [See also *Municipal Securities Corp. v. Street Ry. Co.*, 196 S. W. 400; *City to use of McGrath v. Clemens*, 49 Mo. 552; *Heman Constr. Co. v. McManus*, 102 Mo. App. 649; *Ranney v. Cape Girardeau*, 255 Mo. 514.]

We therefore rule the point against plaintiff.

IV. It is finally contended by plaintiff that, under the notice to paving contractors, advertising for bids on the improvements proposed, the contractor is to be paid by special tax-bills, issued in his favor, for which there is no authority in the Act of 1919. Counsel argue that the city must do the work and issue the bills in its own name.

Tax Bill to Contractor.

The Act of 1919 specifically provides that the work shall be done by the city "*or shall be contracted for*" as provided by ordinance, that the cost shall be defrayed "by a special tax assessed in favor of the city," and that special tax-bills shall be "issued and collected in the manner hereafter provided by ordinance." Sections 22 and 23 of Ordinance 42 of the City of Jefferson, introduced in evidence, provide for the levy of an assessment for the cost of improvements and the issuance of special tax-bills against the property charged, and Section 25 of said ordinance provides that such tax-bills "shall be assignable." The exact language of the notice to contractors, with respect to payment, is: "Payment is to be made by special tax-bills issued against the property abutting the streets intended to be improved." It follows that tax-bills may be issued directly to the contractor or may be issued to the city and assigned by it to the contractor doing the work. The point made is wholly without merit and we rule it against plaintiff.

This concludes all the questions raised by appellant. From what has been said it follows that the judgment must be affirmed. It is so ordered. All concur, except *Walker, C. J.*, and *James T. Blair, J.*, not sitting.

ADA J. COCHRAN, Appellant, v. JAMES WILSON
et al.

Division Two, April 7, 1921.

1. **NEGLIGENCE: Board of Education: Liability.** On the ground of its legal character alone as a quasi-corporation, the Board of Education of the City of St. Louis is not answerable in damages for negligence in the matter of keeping school grounds in a reasonably safe condition for pedestrians.
2. ———: ———: ———: **Governmental Function.** In the exercise of the duty conferred upon it by statute of erecting and maintaining public schools for the education of children, a school district, and especially the Board of Education of the City of St. Louis, performs a public or governmental power, and not a special corporate or administrative duty, and is not liable in damages for the negligent acts of its officers or agents in maintaining or repairing school buildings or grounds.
3. ———: ———: ———: **Trust Funds.** School funds are collected from the public to be held in trust by boards of education for the specific purpose of education, and an attempt to otherwise apply them is without legislative sanction and finds no favor with the courts. Such funds are similar to the funds of a charitable hospital, which, being devoted to a specific purpose, cannot be diverted or absorbed by claims arising from the negligence of its trustees or employees.
4. ———: **City: Injury to Pedestrian.** Unless the ground upon which a pedestrian was walking at the time she fell down a series of steps was a public highway, she cannot recover damages from the city.
5. ———: ———: ———: **Steps on School Ground.** The space between a school building and a theatre was paved with granitoid and used as a thoroughfare by pedestrians passing from the street in front of the buildings to the next parallel street. The space was school ground, and in it was a series of four or five granitoid steps leading down to an entrance to the theatre. The grounds were unlighted, and plaintiff, walking along the paved passageway at night, fell down the steps and was injured. *Held*, that the liability of the city is dependent upon whether the space can be classed as a public highway, and it could become a public highway only by condemnation, formal dedication or adverse user.

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6. ———: **Highway: School Grounds: Condemnation.** The land on which the steps were located where plaintiff fell and was injured being the property of the Board of Education, it could not be condemned as a highway, having already been devoted to a public use.
7. ———: ———: ———: **Adverse User.** The statute providing that statutes of limitation shall not extend to lands given, granted, sequestered or appropriated to any public, pious or charitable use, nor to any lands belonging to the State, a strip of land belonging to the Board of Education and used as a necessary appurtenance to one of its school buildings cannot become a public highway by adverse user. Besides, even if by adverse user it could become a public highway, there was no showing of such continuous use for a term of years as caused it to ripen into a prescriptive right to use the passageway as a highway.
8. **APPEAL: Errors Against Respondent.** Only adverse rulings of the trial court can form the basis of a complaint by an appellant. Upon an appeal by plaintiff alone from a judgment in her favor, assignments by defendant of errors based upon alleged improper admission and exclusion of testimony and the giving and refusing of instructions are not matters for consideration.
9. **VERDICT: Unreasonably Small: Inadequacy.** An appellant has the right to have set aside a verdict for personal torts either excessively large or ridiculously small, where the result indicates passion, prejudice or misconduct on the part of the jury. In determining whether it is such, the presumption is in favor of the good conduct of the jury; and if upon the whole record the case predominates in favor of the defendant or the evidence is evenly balanced, the courts will refuse to interfere with a nominal verdict, although at first view it may appear illogical. Inadequacy of the award is not alone a sufficient basis for setting aside the verdict.
10. ———: ———: ———: **Liability of Defendant.** And where there is no evidence that the space between the school building and the theatre was in control of the theatre owner, and the trial court might for that reason have sustained a demurrer to the evidence, the verdict of \$250 for a pedestrian, who was directed by said defendant's employee to enter the theatre from said passageway, will not be disturbed upon plaintiff's appeal alone.

Appeal from St. Louis City Circuit Court.—*Hon. Frank Landwehr*, Judge.

AFFIRMED.

Earl M. Pirkey for appellant.

(1) There is a limitation imposed upon the rule that counties are not liable for the negligence of county courts. That limitation is to the effect that said rule is applicable only when liability is sought to be based upon the neglect of some duty enjoined upon the county court without its consent. But where the county court voluntarily enters upon the performance of some act or duty which it could not have been compelled by law to perform, the county thereupon becomes subject to the same liabilities for the negligence in the performance of such special duties as private corporations would be if the same duties were imposed upon them. *Hannon v. County of St. Louis*, 62 Mo. 313; *Clark v. Adair County*, 79 Mo. 536. The above limitation to the foregoing rule is more peculiarly applicable to cases where the negligence occurs with respect to the improvement or management of county property of which the county is the owner or proprietor. *Hannon v. County of St. Louis*, 62 Mo. 319; *Clark v. Adair County*, 79 Mo. 537. In the case at bar, there are no allegations in the petition that would show that the negligence of defendant Board of Education was with reference to some matter or duty which the board could have been compelled to perform or that was not discretionary with it. Furthermore, in the case at bar, the premises with reference to which the negligence occurred was property in which the Board of Education had a proprietary interest, the exact nature of which is not specified in the petition, the petition alleging that the defendants were in charge and control of and using the said premises. For what specific purpose the board had acquired this property is not stated in the petition, but must have been for some purpose for which it had legal authority to hold property under the statute, the board might have acquired the ground for some use connected with the schools or for the purpose of investing school funds in real estate. R. S. 1909, sec. 11030. Whatever property

the Board of Education acquires or holds is virtually the property of the school district, and in the management of such property the board is acting as the agent of the district. But more strictly speaking, the statute vests the legal ownership of the property in the Board of Education itself, so that the negligence of the Board is legally with respect to its own property. R. S. 1909, sec. 11030. However, the entire doctrine which exempts counties and school districts from liability for the negligence of county courts and school boards is erroneous, because in conflict with the fundamental principles of law, and for that reason the Supreme Court should overrule the former decisions sustaining that doctrine. We believe that the dissenting opinion in *Swineford v. Franklin County*, 73 Mo. 279, states the true view of the matter in holding "that the alleged distinction between the liability of municipal corporations and the non-liability of *quasi*-corporations under like circumstances, is based upon precedent rather than reason, and is not sound." Two of the judges dissented from the decision of the majority of the court. *Swineford v. Franklin County*, 73 Mo. 279. The reasons assigned in support of the non-liability of counties and school districts are found when analyzed to be radically unsound and at variance with the true principles of law. One of the reasons alleged is that counties and school districts, on account of being political subdivisions of the State government, should enjoy immunity from liability for torts. This reason is a remnant of the old doctrine that "the king can do no wrong," and in its applications to counties and school districts, is absurdly out of place as well as unjust in its operation. The City of St. Louis is also a political subdivision of the State, the same as a county. *Gracey v. St. Louis*, 213 Mo. 387. Yet the City of St. Louis is held liable for the negligence of its officials in numerous decisions of the appellate courts of this State. If it is proper to hold the City of St. Louis liable, it is also proper to hold counties and school districts liable for the torts of their officials. It is expressly provided by statute that the Board

of Education in cities of 500,000 inhabitants or over may "by and in said name sue and be sued." R. S. 1909, sec. 11030. What good reason, and what authority, can there be for whittling down the application of the above provision of the statute and holding that it applies only to suits on contract liabilities and not to suits on liabilities for torts. This provision is general in its terms and without qualification imparts to the Board of Education the capacity of being sued the same as any individual or corporation. The further reason assigned in some decisions why counties should be exempt from liability is that county courts deriving their functions directly from the state are independent of the counties, and the counties having no authority to direct or instruct the county courts in regard to the performance of their duties, the counties therefore should not be held liable for their negligence. A distinction is raised between counties and municipal corporations in this respect. The above distinction is not a real one. There is no real difference between a municipal corporation and a county in this regard. The Constitution of our State provides: "The courts of justice shall be open to every person and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Mo. Constitution, Art. 2, Sec. 10. Depriving plaintiff of the right to sue the Board of Education for compensation for the injuries sustained by her from the negligence of said Board in the management of school property, is in direct violation of the above mandatory provision of the Constitution. *Theiles v. Tillamook County*, 75 Ore. 214, 146 Pac. 828. A person is entitled to sue a county for damages resulting from negligent defects in public roads. Otherwise there would be a right without a remedy. *County Commissioners v. Duckett*, 20 Md. 468. The Board of Education can be sued for damages growing out of its negligence in the maintenance or management of school property, *Waheman v. Board of Education*, 187 N. Y. 331, 116 Am. St. 609; *M'Carton v. City of New York*, 133 N. Y. Supp.

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939, 149 App. Div. 516. (2) The trial court committed error in sustaining the demurrer of defendant City of St. Louis to the evidence. The evidence shows that the premises in controversy were used by the general public as a thoroughfare or street for travel on foot by night and day and that it had been so used for nearly twenty years; that its said use was open and public; that it was recognized as a public thoroughfare by its policeman, who directed people to go through it. There was a sufficient case made against the defendant city to go to the jury. *Hemphill v. City of Morehouse*, 162 Mo. App. 574; *Curran v. St. Joseph*, 264 Mo. 659. (3) The verdict for \$250 for the plaintiff against defendant Wilson is grossly inadequate, in view of the character and extent of the damages sustained by plaintiff, and accordingly the judgment should be reversed and plaintiff granted a new trial. *Craton v. Huntzinger*, 187 S. W. 51.

Robert Burkham for respondent.

(1) The Board of Education of the City of St. Louis is a *quasi*-corporation and so being is not liable for the negligence of its members, officers or employees. *Reardon v. St. Louis County*, 36 Mo. 555; *Swineford v. Franklin County*, 73 Mo. 279; *Clark v. Adair County*, 79 Mo. 536; *Cunningham v. St. Louis*, 96 Mo. 53; *Reed v. Howell County*, 125 Mo. 58; *Lamar v. Road District*, 201 S. W. (Mo.) 890; *Moxley v. Pike County*, 276 Mo. 449; *McClure v. School Dist.*, 79 Mo. App. 80; *Freel v. School City of Crawfordsville*, 142 Ind. 27, 37 L. R. A. 301; *Ford v. School Dist.*, 121 Pa. 543; *Finch v. Board of Education* 30 Ohio St. 37. (2) The matter of public education is a governmental function, in consequence of which the Board of Education of the City of St. Louis is not liable for negligence in the performance of such duty. Mo. Constitution, Art. 11, sec. 1; *Murtaugh v. St. Louis*, 44 Mo. 479; *Ulrich v. St. Louis*, 112 Mo. 138; *Cassidy v. St. Joseph*, 247 Mo. 197; *Hill v. Boston*, 122 Mass. 344; *Wixon v. Newport*, 13 R. I. 454; *Folk v. Milwaukee*, 108

Wis. 359. (3) It is contrary to public policy to allow charitable funds, and particularly public charitable funds, to be subjected to the demands of those injured by the negligence of those administering such funds. *Nicholas v. Evangelical Deaconess Home*; 219 S. W. (Mo.) 643; *Adams v. University Hospital*, 122 Mo. App. 675; *Whittaker v. Hospital*, 137 Mo. App. 116; *Freel v. School City of Crawfordsville*, 142 Ind. 27; *Ford v. School Dist.*, 121 Pa. 543; *Wiest v. School Dist.*, 68 Ore. 474, 49 L. R. A. (N. S.) 1025; *Weddle v. School Commrs.*, 94 Md. 334.

Charles H. Daues, Arthur H. Buder and H. A. Hamilton for City of St. Louis.

(1) A street can be established by dedication, condemnation or prescription. There is no evidence of a dedication or condemnation, and the evidence does not establish that the place where appellant was injured became a public thoroughfare by user. *Stacey v. Miller*, 14 Mo. 478; *Brinck v. Collier*, 56 Mo. 160; *Landis v. Hamilton*, 77 Mo. 554; *Anthony v. Kennard Bldg. Co.*, 188 Mo. 704; *Railway Co. v. Wollard*, 60 Mo. App. 631; *Coberly v. Butler*, 63 Mo. App. 556; *Strong v. Sperling*, 200 Mo. App. 66. (2) The appellant was injured on property belonging to the Board of Education of the City of St. Louis. The respondent, the City of St. Louis, could not acquire title to this property for street purposes either by condemnation or prescription. *City of St. Louis v. Moore*, 269 Mo. 430; R. S. 1909, sec. 1886.

WALKER, J.—This is an action for personal injuries brought in the Circuit Court of the City of St. Louis by plaintiff against the Board of Education, the City of St. Louis and James Wilson. The Board of Education demurred to the petition. The demurrer was sustained and exceptions saved. Upon a trial before a jury a demurrer to plaintiff's testimony filed by the City of St. Louis was sustained, and the court's action in regard thereto was preserved by plaintiff for review

on appeal. The result of the trial was a verdict for plaintiff in the sum of \$250 against James Wilson. The trial court thereupon entered judgment for plaintiff against him, dismissed the suit as to the City of St. Louis and entered judgment in favor of the Board of Education. Plaintiff appealed to this court.

The alleged liability of the City of St. Louis and its joinder as one of the defendants is the basis of this court's appellate jurisdiction.

The defendant James Wilson owned a large theatre building in the City of St. Louis called the Odeon. This building, No. 1042, is located on the east side of North Grand Avenue. Immediately south, with a driveway or open space between, is located one of the high school buildings of the city, belonging to and under the supervision of the Board of Education. The space between these two buildings was covered with granitoid, and near the high school building there were ten or twelve steps leading from the level of Grand Avenue to the grounds of the high school building. The space between these two buildings, affording an opportunity for passage by pedestrians from Grand Avenue to School Street or *vice versa*, was used as a thoroughfare by persons in going from one of these streets to the other. The plaintiff having been directed, as she says, by the manager of the Odeon in her efforts to enter the building, was passing over the high school grounds, which were not lighted, when she fell down a flight of steps and received the injuries for which she claims damages. The plaintiff assigns error in the court's sustaining the demurrer of the Board of Education to her petition; in sustaining the demurrer of the City of St. Louis to plaintiff's evidence; and in entering judgment on a grossly inadequate verdict rendered in her favor against James Wilson. These in their order.

I. As to the first assignment, it is not a question as to the sufficiency of the formal allegations of the petition, but do those alleged state a cause of action

Liability of School District. against the Board of Education? This board is a *quasi*-corporation and bears a like relation to the State or its educational system to that sustained by a school district. [Art. XIII, chap. 106, R. S. 1909; Art. XVI, chap. 102, R. S. 1919.] Even more definite in terms and comprehensive in scope than the laws defining the corporate existence of ordinary school districts is that in relation to such a district as is authorized to be created in a city of 500,000 inhabitants or over, or that at bar. [Secs. 11030 et seq., R. S. 1909; Secs. 11456 et seq., R. S. 1919.] The reasons prompting legislative action in the creation of school districts has been judicially defined many times, nowhere perhaps more fully or clearly than in *Freel v. School of Crawfordsville*, 142 Ind. 27, in which recovery was sought by a laborer in a suit against a school district for injuries while working on a school building. A demurrer to the petition was sustained and there was judgment for the defendant. This was affirmed on an appeal to the Supreme Court. In discussing the *quasi*-corporate capacity of the district as a ground of non-liability, at page 28, the court said, in effect:

"They are involuntary corporations, organized, not for the purpose of profit or gain, but solely for the public benefit, and have only such limited powers as were deemed necessary for that purpose. Such corporations are but the agents of the State for the sole purpose of administering the state system of public education. It is the duty of the school trustees of a township, town, or city, to take charge of the educational affairs of their respective localities, and, among other things, to build and keep in repair public school buildings. In performing the duties required of them, they exercise merely a public function and agency for the public good, for which they receive no private or corporate benefit. School corporations, therefore, are covered by the same law in respect to their liability to individuals for the negligence of their officers or agents, as are counties and townships. It is well established that where subdivis-

ions of the State are organized solely for a public purpose by a general law, no action lies against them for an injury received by a person on account of the negligence of the officers of such subdivision, unless a right of action is expressly given by statute. Such subdivisions, then, as counties, townships and school corporations, are instrumentalities of government and exercise authority given by the State and are no more liable for the acts or omissions of their officers than the State."

The question as to the liability of *quasi*-corporations for the negligence of their directors, officers or employees has, in regard to other than school districts, been frequently considered by this court. In *Reardon v. St. Louis County*, 36 Mo. 555, an action was brought by a widow against the county for the death of her husband alleged to have been caused by the negligence of the county in failing to keep a bridge in repair. A demurrer was sustained to the petition and upon appeal to this court the judgment was affirmed.

The basis for this ruling, briefly stated, is that counties are *quasi*-corporations created by law for purposes of public policy and are not answerable in damages for a failure to perform the duties enjoined on them unless the right of action is given by statute.

In *Swineford v. Franklin County*, 72 Mo. 279, the plaintiff brought suit against the county for damages caused by the county court ordering the filling up of a mill race which crossed a public highway. By a divided court the plaintiff was held not entitled to recover, on the ground of the non-liability of the county as a *quasi*-public corporation in its control, through the county court, of the public highways.

In *Clark v. Adair County*, 79 Mo. 536, the county was held not liable in an action for damages caused by the falling of a bridge on a public road. Following the rule in the *Reardon* and *Swineford* cases, *supra*, the court held that "counties are territorial subdivisions of the State, and are only *quasi*-corporations created by the Legislature for certain public purposes. As

such they are not responsible for neglect of duties enjoined on them or their officers unless a right of action for such neglect is given by the statute. Such has always been the rule in this State."

In *Cunningham v. St. Louis*, 96 Mo. 53, an action was held not maintainable against the city for an injury resulting from its negligence in permitting an unguarded pit to exist adjacent to the approach to the courthouse. In the maintenance of the courthouse the city was held to be occupying the same relation towards the State as that of a county in regard to its courthouse, and on the same ground of non-liability of a county under like circumstances the city was held not to be liable. The reason for this ruling was, as is evident, the *quasi*-corporate character of the city in its maintenance of the courthouse as a facility for the transaction of the State's business, viz., the collection of the revenue.

In *Reed v. Howell County*, 125 Mo. 58, citing with approval the foregoing cases, a county was held not liable for damages arising from a wrongful attachment of property. The reason for non-liability in this case is based upon the presumption that in the absence of any allegation in the petition to the contrary the officers of the county, in the institution of the suit on which the attachment was based, were engaged in the performance of those public duties which were enjoined on them by the authority of the statute and were not undertaken for their private benefit or the emolument of the county.

In *Lamar v. Bolivar Road District*, 201 S. W. 890, this court ruled that a special road district, being a *quasi*-corporation, is not liable for an injury occurring upon a highway. This ruling was but a reiteration of the doctrine which has been announced in this State since the *Reardon* case in 1865.

In *Moxley v. Pike County*, 276 Mo. 449, l. c. 453, this court ruled that a county was not liable for an injury caused by a defective highway. The reasons for the court's ruling are stated somewhat elaborately and may not inappropriately be quoted in this connection.

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"When, for convenience in the administration of its laws, the State, through the Legislature, calls to its aid those territorial organizations sometimes called, with more or less accuracy, *quasi*-corporations, such as counties, townships and school districts, the question has frequently arisen whether these agencies share, with the State itself, immunity from common-law liability for the negligence of their officers in the exercise of their territorial duties. The answer, from the courts of this State, has generally been a negative one. From *Rear-don v. St. Louis County*, 36 Mo. 555, down to *Lamar v. Bolivar Special Road District*, 201 S. W. 890, are many cases which will be found collected in the case last cited which have settled the general principle so firmly that it is not questioned by this appellant. On the other hand, it has been equally well settled that municipal corporations, which include cities, towns and villages, are, in the control, management and maintenance of their streets, alleys and public places, subject to such liability. The cases recognizing this doctrine are so numerous and so constantly before our appellate courts and their doctrine so well recognized as to render citations not only unnecessary but unjustifiable. This general doctrine is also recognized and admitted by the parties to this appeal."

The only variance from the uniformity of this ruling in regard to the non-liability of *quasi*-corporations is found in the case of *Hannon v. County of St. Louis*, 62 Mo. 313. This case, however, was impliedly overruled in *Swineford v. Franklin County*, *supra*, and was expressly disapproved in the late case of *Moxley v. Pike County*, *supra*. The current of authority, therefore, as we have stated it, is unbroken.

While the political subdivisions whose rights, powers and liabilities were discussed and determined in the cases cited were not school districts, the latter possess all the characteristics of *quasi*-corporations of the former, and may, with a reasonable regard for the rules of construction, be thus classified and held to be immune from liability in actions for damages for like reasons.

An exhaustive review of the authorities on this subject will be found in 37 L. R. A. 301, in a note appended to the Freeland case, *supra*.

On the ground, therefore, of its legal character alone as a *quasi*-corporation the Board of Education is not answerable in this connection for the negligence charged.

Independent, however, of the foregoing, another reason exists for the non-liability of the Board of Education in a proceeding of this character. Public education is a governmental function. This is clearly recognized in our organic law, which declares that "a general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years." [Art. XI. sec. 1, Const. Mo.]

Prompted by this provision, the General Assembly has legislated liberally concerning public schools and especially so in the statute creating the Board of Education of the City of St. Louis (Art. XIII, chap. 106, *supra*), which is clothed with the supervision, control and management not only of the public schools but of the school property of said city, and to effect the purpose of its creation such powers have been conferred and duties enjoined upon it as the Legislature in its wisdom deemed necessary. In defining the corporate character of the Board of Education this court has said; "The School Board of St. Louis is an instrumentality created by the laws of the State to administer the trust created and assumed by the State for the education of the children of the State." [State ex rel. O'Connell v. Board, 112 Mo. 1. c. 218.]

Speaking of school districts generally, we said in the later case of State ex rel. School District v. Gordon, 231 Mo. 547, 1. c. 574: "But a school district is but the arm and instrumentality of the State for one single and noble purpose, namely, to educate the children of the district, a purpose dignified by solemn recognition in our Constitution."

These conclusions are sufficiently indicative of the nature of school districts to authorize their classification as instrumentalities engaged in the performance of governmental functions and hence subject to the same rules as to nonliability for negligence as other subdivisions of the State charged with the performance of like duties.

In *Murtaugh v. St. Louis*, 44 Mo. 479, the plaintiff sought to hold the city liable for injuries alleged to have been received by him through the negligence of employees while he was a patient at the city hospital. In holding the city not liable this court thus stated the rule: "The general result of these adjudications seems to be this: where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties; but when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of the officers and servants."

In *Ulrich v. St. Louis*, 112 Mo. 138, this court held that since the maintenance of the city workhouse was in pursuance of the governmental functions of the city of St. Louis it was not liable for injuries received by a prisoner therein, although caused by the negligence of the city's employees. In ruling upon this question the court said: "The rule of law is well settled in this State that a municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are conferred on the corporation or its officers for the public good. [*Murtaugh v. City*, 44 Mo. 479; *Armstrong v. City*, 79 Mo. 319; *Kiley v. City*, 87 Mo. 103; *Carrington v. City*, 89 Mo. 208; *Keating v. City*, 84 Mo. 415; 2 *Dillon on Municipal Corporations* (4 Ed.), sec. 965a.]"

In *Cassidy v. St. Joseph*, 247 Mo. 197, this court, applying the same doctrine, held that the city was not

liable for injuries caused by servants in hauling refuse.

If the operation of a city hospital, the maintenance of a workhouse or the collection of garbage are properly referable to the governmental functions of a city, no argument is required to establish the fact that the education of youth partakes of the same, although it may be of a higher character, and that the instrumentality, namely, a board of education, through which this function is exercised is consequently immune from actions for damages on account of negligence. Cases from courts of last resort elsewhere give added force to this conclusion. [Hill v. Boston, 122 Mass. 344; Wixon v. Newport, 13 R. I. 454; Folk v. Milwaukee, 108 Wis. 359.]

Finally, as conclusive of the rule stated in the cases cited, it is appropriate that the conclusions of the learned author of a leading treatise on Municipal Corporations be quoted in this connection:

“When a municipal corporation is charged by charter or statute with the duty of erecting and maintaining public schools for the education of the children of the municipality, the weight of authority is to the effect that in the exercise of the power so conferred it performs a public or governmental duty and not a special corporate or administrative duty, as distinguished from a state or public duty, and it is not impliedly liable for the wrongful acts and negligence of its officers or agents in maintaining and repairing school buildings.” [4 Dillon on Munic. Corps. (5 Ed.) sec. 1658.]

Another equally cogent reason why the Board of Education cannot be required to respond to an action of the character of that at bar is the nature of the fund entrusted to its care and distribution. School funds are collected from the public to be held in trust by boards of education for a specific purpose. That purpose is education. An attempt, therefore, to otherwise apply or expend these funds is without legislative sanction and finds no favor with the courts. Cases in which hospitals have been held exempt from actions for damages for negligence on account of their character as charitable

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institutions may not inappropriately be cited in this connection.

In *Nicholas v. Evangelical Hospital*, 281 Mo. 182, a patient sued the hospital for damages for burns inflicted from the negligence of a nurse. The court, in holding the hospital not liable, said: "The law has been firmly established by the great weight of authority that the funds of a charitable hospital or association are trust funds devoted to the alleviation of human suffering, and cannot be diverted or absorbed by claims arising from the negligence of the trustees or their employees in administering the trust or charity." In thus ruling the court cited with approval two Courts of Appeals cases in which the exemption of hospitals from the rule of *respondent superior* was clearly set forth.

In *Adams v. University Hospital*, 122 Mo. App. 675, suit against the hospital had been brought by a patient burned with hot-water bottles while under the influence of an anesthetic. The court held that the hospital, being a charitable institution, was not liable for the negligence of either its managers or its employees. ELLISON, J., at page 636, thus states the reason for this ruling: "But it is manifest that if we uphold a rule which would make an institution of charity liable to a patient who has been injured by an incompetent servant, negligently selected, we destroy the principle we have endeavored to make plain, that charitable trust funds cannot be diverted from the purposes of the donor. For it can make no difference, so far as the integrity of the fund is concerned, whether it be sought after by one who is injured by the negligence of a servant, or the negligent selection of such servant."

In *Whittaker v. Hospital*, 137 Mo. App. 116, an employee brought suit against the hospital for injuries. In denying liability GOODE, J., at page 120 said: "Two rules of law, both founded on motives of public policy, come into conflict here; the rule of *respondent superior* (or if not technically that, one akin to it) and the rule exempting charitable funds from executions for damages

on account of the misconduct of trustees and servants. As both rules rest on the same foundation of public policy, the question is whether, on the facts in hand, the public interest will best be subserved by applying the doctrine of *respondeat superior* to the charity, or the doctrine of immunity; and we decided this cause for respondent because, in our opinion, it will be more useful on the whole not to allow charitable funds to be diverted to pay damages in such a case; and, moreover, the weight of authority is in favor of this view, as expressed not only in cases where the parties seeking damages were patients in the institution, but where they were not."

There may be grounds, not necessary to be discussed here, for exceptions to this rule in its application to hospitals commercially conducted and which might seek shelter under the ample cover of charity in the broadest acceptation of that term. This, however, is aside in the determination of the matter at issue.

If it is against public policy as ruled in the foregoing cases to divert charitable funds, so-called, from other than the purpose for which they have been collected, how much stronger is the case where the funds are the fruit of taxation, belong to the people and are to be used for the beneficent purpose of free education. Their immunity from the payment of damages for negligence need not rely, however, upon the analogous rule applicable to the funds of charitable institutions but finds express approval in *Freel v. School of Crawfordsville*, supra; *Ford v. School District*, 121 Pa. 543; *Wiest v. School District*, 68 Ore. 474; *Weddle v. School Commrs.*, 94 Md. 334, and numerous other cases of like character.

In the *Weddle* case at page 344, the doctrine in regard to the sacredness of public school funds is thus succinctly declared: "There is no power given the board of School Commissioners to raise money for the purpose of paying damages, nor are they supplied with means to pay a judgment against them. All of their funds are appropriated by law to specific purposes and they

cannot be diverted by them. The Constitution of the State (Sec. 3, Art. 8) provides that the school fund of the State shall be kept inviolate and appropriated only to the purposes of education. In *Perry v. House of Refuge*, 63 Md. 27, this court distinctly held, in adopting the English decisions on the subject, that damages could not be recovered from a fund held in trust for charitable purposes."

While there are cases which have held school districts liable for torts, the great weight of authority is to the contrary. In view of the foregoing we hold that the Board of Education is not liable.

II. The liability of the City of St. Louis under the facts is dependent wholly upon whether the space between the Odeon and the high school building can be classified as a public highway. It is elementary

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of City.**

that land may become a public highway by either dedication, condemnation or prescription. It is not contended that the property was either condemned for or formally dedicated to a public use. It is undisputed that the Board of Education owned the land on which the steps were located where the plaintiff was injured. This being true, there could have been no condemnation of the property for a public highway, on the ground that it was already devoted to a public use; and, as we held in *St. Louis v. Moore*, 269 Mo. 430, being already so devoted, it could not for this reason be condemned as a highway. Condemnation eliminated, it could not have been acquired by the public through adverse user, in the presence of the statute (Sec. 1886, R. S. 1909, Sec. 1314, R. S. 1919), which provides that Statutes of Limitations shall not extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use nor to any lands belonging to the State. Owned by the Board of Education and used as a necessary appurtenant to one of its buildings, it became as completely subject to the above statute as if set apart for any other well defined public purpose.

If this property could not be subjected to condemnation and was not affected by adverse user, as we are authorized in holding from the Moore case and the statute, *supra*, what gloss is needed or can be supplied to give strength to the conclusion as to the non-liability of the city? Waiving for the nonce, however, these reasons, which we deem ample, that appellant's contention may be viewed from every point of vantage, what are the facts as tending to show such user as would constitute the space a public highway? There was an entrance to the high school building on the north side of same, access to which was afforded by the space referred to. This was much used by children attending the school and by others as affording a readier and more convenient means of passing to and from Grand Avenue. As disclosed by the testimony, this use, so far as the public was concerned, was purely permissive on the part of the board and was not otherwise claimed by those who enjoyed it. No one testified that the passageway was used as matter of right and hence that it was regarded as a public highway, but simply because such use was not prohibited. Technically considered, such users, instead of being clothed with a right, might not inaptly be termed trespassers. If not so regarded, however, there is no such continuous use shown for a term of years as to cause same to ripen into a prescriptive right to use the passage as a highway. Absent this evidence, there is nothing to sustain the contention as to the city's liability.

III. In plaintiff's appeal from the judgment in her favor against James Wilson, assignments of error based on the alleged improper admission and exclusion of testimony and the giving and refusing of instructions are not matters for our consideration. Errors thus alleged to have been committed were cured by the jury's finding in plaintiff's favor. [Craton v. Huntzinger, 187 S. W. 48; Baker v. Mod. Woodmen, 140 Mo. App. 619; Knittell v. United Rys., 147 Mo. App. 677.]

Errors
Against
Respondent.

It is only the adverse rulings of the trial court that can form the basis of complaint by an appellant. [Shull v. Railroad, 221 Mo. l. c. 146; Harrison v. Lakenan, 189 Mo. 581; Brown v. Globe Pr. Co., 112 S. W. 462.]

Thus limited to a review of such errors as have been preserved by the appellant, it is futile for the respondent Wilon to urge here and now that there was no evidence on which to base the verdict; he acquiesced in its rendition, has not appealed, and in the presence of any substantial evidence to sustain the same we will not disturb it, even upon the contention of appellant. [Ross v. Presbyterian Church, 272 Mo. l. c. 107; Imp. Co. v. Harv. Mach. Co., 268 Mo. l. c. 369.]

IV. This leaves for consideration, therefore, the question as to the inadequacy of the verdict.

Well considered cases establish the right of an appellant to have a verdict set aside either excessively large or ridiculously small in actions for personal torts, where the result indicates passion, prejudice or misconduct on the part of the jury.

Inadequate Verdict. The rulings of this court upon this question have been carefully collated by LAMM, J., in Fischer v. St. Louis, 189 Mo. l. c. 577, and their repetition here would serve no useful purpose. They abound in subtle distinctions or nice refinements and are so dependent upon their particular facts as not to be subject to any general rule governing the conclusions reached. In regard to them this much may be stated generally: that in arriving at a conclusion the presumption is in favor of the good conduct of the jury, and if upon the whole record the case preponderates in favor of the defendant or the testimony is evenly balanced, the courts will refuse to interfere with nominal verdicts although at first view they may appear illogical.

In Pritchard v. Hewitt, 91 Mo. l. c. 550, quoting with approval 1 Graham & Waterman on New Trials (2 Ed.) p. 451, this court says that the reason for holding so tenaciously to the damages found by a jury in cases of personal torts is that in this class of cases there

is no scale by which the damages may be graduated with certainty. They admit of no other test than the intelligence of the jury, governed by a sense of justice.

To the jury, therefore, is committed the exclusive task of examining the facts and circumstances to enable them to estimate the injury and award compensation therefor in damages. The law conferring this power and exacting the performance of this trust favors the presumption that the jury will be actuated by proper motives; and not until the result of their deliberation is manifested in such a form as to shock the understanding and indicate in no uncertain manner the presence of passion and prejudice will the courts interfere with their findings.

Than the amount of the verdict itself there is no indication here that the jury was influenced in their deliberations except by the facts. We have never held that the inadequacy of damages for personal injuries will of itself furnish the basis for such a presumption of passion and prejudice as will authorize a reversal of the judgment.

The reports are replete with declarations as to the superior opportunity afforded the trial judge over the appellate court by reason of the participation of the former in the moving panorama of the trial to correctly weigh the testimony and rightly determine the truth of the matter at issue. In recognition of this fact appellate courts defer largely to the actions of the trial courts, especially when the interference sought is based solely on the ground of an alleged excessive or inadequate verdict. Panoplied with this superior knowledge, which the letter of the record alone cannot afford, that sound discretion which it must be presumed the trial judge exercised in refusing to disturb the verdict, will not be accounted error. [Devine v. St. Louis, 257 Mo. 470; Morrell v. Lawrence, 203 Mo. 363; McCarty v. Transit Co., 192 Mo. 396; McCloskey v. Pulitzer Pub. Co., 163 Mo. 22; Minter v. Bradstreet, 174 Mo. 444.]

Furthermore, the appellant is not entitled as a matter of right to have this verdict set aside unless her case

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is such that if the finding had been for the defendant she would have been entitled to have it set aside. Or, more concretely stated, if the jury has returned a verdict for nominal damages in a case where the plaintiff is entitled to no damages, the verdict will not be set aside by the appellate court at the instance of the plaintiff. [Haven v. Mo. Railroad, 155 Mo. 216; Dowd v. Air Brake Co., 132 Mo. 579.]

Waiving the lack of definite particularity in alleging that the plaintiff received her injuries on the premises in charge of and under the control of the defendant Wilson, there is no evidence of such control on his part. The permissive use by the public of such premises sometimes perhaps as a means of egress or ingress to the defendant's building, or the fact that his employee directed the course pursued by plaintiff at the time of her injury, does not constitute evidence of such control or use. The trial court, therefore, would have been justified in sustaining a demurrer to the evidence. In this state of the record we will not disturb the verdict at the behest of the plaintiff, and the defendant, not having appealed, has no ground of complaint. [Leahy v. Davis, 121 Mo. l. c. 236; Overholt v. Vieths, 93 Mo. l. c. 426.]

In view of all of which the judgment of the trial court is affirmed. It is so ordered. All concur.

Ex Parte WALTER LEE.

Division Two, April 7, 1921.

1. **IMPRISONMENT: Parole: Subsequent Conviction: Penalties Cumulative.** The terms of imprisonment of a person who has been convicted of a felony, has been paroled and again convicted of another felony and whose parole, after he has been again committed to the Penitentiary under the second conviction, has been revoked by the Governor, are cumulative and not concurrent; and under the statutes, his term of imprisonment under the second conviction does not begin until he has served out his sentence under the first.

2. ———: ———: ———: **Error in Bookkeeping.** And the fact that Prison Control show that, upon the reseption of the convict under Prison Control show that, upon the reception of the convict under his second conviction, he was held and continued to serve under said second commitment and that he was discharged therefrom under the three-fourths rule for good behavior, does not affect the legality of his imprisonment under the first commitment for the balance of the term remaining after his parole was revoked. That was a mere error of bookkeeping, although the second commitment began before the parole under the first was revoked.

Habeas Corpus.

WRIT DENIED.

Fenton Luckett for petitioner.

Jesse W. Barrett, Attorney General, for respondent.

HIGBEE, P. J.—Petition for writ of *habeas corpus*. The petitioner states that he is unlawfully detained in the Penitentiary; that he was convicted of a felony in the Circuit Court of Jackson County, August 2, 1915, and sentenced to a term of five years in the Penitentiary; that on April 24, 1917, he was paroled by the Governor; that on October 8, 1917, he was convicted of a felony in the Circuit Court of Jasper County and sentenced to a term of five years in the Penitentiary and was received there on November 13, 1917; that on November 20, 1917, the Governor revoked his parole; that on December 28, 1920, the prison authorities discharged him under the merit system from the Jasper County sentence, but are now illegally restraining him under the Jackson County sentence, aforesaid; that upon the revocation of his parole said sentences became concurrent and he is now entitled to his discharge.

The issuance of the writ and production of the body of the prisoner have been waived.

The return, made by the Warden of the Penitentiary and the Board of Prison Control, recites the facts sub-

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stantially as set forth in the petition: that the sentences were not such as to cause them to be concurrent, but that they were cumulative and will not expire under the laws of this State prior to January 5, 1923, and for that reason the petitioner is not unlawfully detained.

It appears from suggestions accompanying the return that, on the receipt of the prisoner under the Jasper County commitment on November 13, 1917, the prison board made its record show that the petitioner was held and continued to serve under that commitment until he was discharged under the merit system on December 28, 1920, but no discharge papers were issued to him; that he has been held since that time under the sentence of the Circuit Court of Jackson County to serve out the remainder of that sentence after the revocation of his parole, and is now held under said sentence which will expire, under the three-fourths law, on January 5, 1923.

Section 2292, Revised Statutes 1919, reads, in part: "and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held."

Section 4165, Revised Statutes 1919, reads: "Any person who shall commit any offense while at large under parole may be arrested and tried in the same manner as if he had not previously been convicted or paroled."

The language of this section seems to be general, but that it applies to other than judicial paroles it is unnecessary to decide. By Section 12543, Revised Statutes 1919, the Governor is authorized to grant commutations, paroles and pardons. Certain it is that while the petitioner was at large under a parole granted as an act of executive clemency, he was still under sentence

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within the meaning of Section 2292, and having been charged, tried and convicted of another offense while so at large "the sentence of such convict shall not commence to run until the expiration of the sentence under which he is held." In other words, the sentences are cumulative.

This was the conclusion reached in *Ex parte Allen*, 196 Mo. 226. In that case, after Allen had been convicted and while he was being held in the county jail awaiting removal to the Penitentiary, he committed another felony for which he was tried, convicted and sentenced. At the expiration of the period of the first sentence, he sought to be released on the ground that the sentences were concurrent. In an opinion by GANTT, J., this court held that the case came within the provisions of Section 2383, Revised Statutes 1899, now Section 2292, and that the sentences were cumulative.

It seems, however, that the Board of Prison Control made its records show that the petitioner was held under the conviction and sentence of the Jasper County Circuit Court from the time he was received under that sentence; that after the time he was entitled to his discharge from that sentence, the prison records show that he has been held under his first conviction to serve out the remainder of his term, dating from his parole. Under the provisions of Section 2292, the sentence for the conviction in the Circuit Court of Jasper County began at the expiration of the first sentence. The petitioner, however, has not been prejudiced by the mistaken views of the Board of Prison Control and can take no advantage of their erroneous system of bookkeeping. The law fixes the sequence of the terms of imprisonment. [*Ex parte Jackson*, 96 Mo. 116, 120.]

Section 1946, Revised Statutes 1919, has no application to the facts in this case. There was no error in either judgment. The petitioner was properly sentenced in each case to the Penitentiary.

The writ is denied. The prison records should be amended to conform to the requirements of the law as above indicated. It is so ordered. All concur.

**EMMA E. MAYNE v. KANSAS CITY RAILWAYS
COMPANY, Appellant.**

Division Two, April 7, 1921.

1. **PLEADING: General and Specific Injuries: Resultant Damages: Natural and Necessary.** When the petition alleges special damages in a personal injury case, the proof must be limited to the special damages pleaded. Where a specific result necessarily follows from an alleged injury it is not necessary to plead it, but where it is the natural but not the necessary result of the injury it must be pleaded in order to admit evidence of it. Also if an allegation of damage contains a general term in describing what follows the injury, then any result coming within the content of that term may be proved without specific allegation; and if the petition contains any allegation of a general nature which may be said to embrace within the general term a resultant damage sought to be proven, and defendant is not satisfied with the general allegation, he should move to make more specific.
2. ———: ———: ———: ———: **Injury to Pelvic Cavity: Impaired Functions: Child Birth.** Where the petition alleges that the bones surrounding the pelvic cavity were broken and crushed, and the organs within the cavity were crushed, and after describing the broken condition of the bones and the dislocation and rupture of the ligaments alleges that "the functions of all of which organs have been seriously and permanently impaired," it contains an allegation of an injury in such general terms as to authorize proof of plaintiff's inability to give birth to a child, since one of the functions of the organs so impaired was child-bearing, and inability to bear children is a necessary result of a permanent impairment of those organs.
3. **DEPOSITION: Absence from State: How Proven.** The facts which will authorize the reading of a deposition may be established by the testimony of deponent or the certificate of the officer taking the same, or if deponent is gone out of the State, by additional proof that his present duty kept him in another State.
4. ———: ———: **In Military Service.** The deposition of a citizen of this State who deposed that at the time it was taken he was in the military service of the U. S. Army and stationed in another State, had been for six months and had not been discharged, and knew not when he would be able to return to his home in this

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State, although its date is not so stated as to determine how long it was taken before it was offered in evidence, is properly admitted in evidence, especially where the attorney for the party offering it testified that he had had correspondence with deponent at the military camp and was willing for opposite counsel to see the correspondence.

5. ———: ———: **Present at Place of Trial.** After a deposition of a witness was admitted in evidence on the ground that he was absent from the State, it was discovered that he was at the place of trial, and he was then sworn for the purpose of allowing the opposite party to cross-examine him, and such offer was declined. *Held*, that there is no reversible error in allowing the deposition to stand, because said opposite party was not harmed by it.
6. **ARGUMENT TO JURY: Comment on Evidence.** Where evidence to show plaintiff's physical condition in a certain particular is competent under the pleadings, comment upon such condition in the argument of her attorney to the jury is not improper.
7. ———: ———: **Mental Suffering.** Mental suffering as an incident to personal physical injury is always an element of damage to be considered by the jury, and it is unnecessary to make specific proof of mental suffering, because it necessarily arises when the nature and extent of the physical injury is shown; and where such injury is shown, it is not error for plaintiff's counsel, in his argument to the jury, to comment on her mental suffering.
8. **NEGLIGENCE: Res Ipsa Loquitur: Passenger.** In determining whether the doctrine of *res ipsa loquitur* applies to a case, it does not matter whether the injured party was a passenger on defendant's street car which injured her.
9. ———: ———: **When Applicable: Case for Plaintiff.** When the instrumentality which causes an injury is within the control of and operated by defendant, and moves or is operated in such a way that such motion or operation would not have happened except for some defect or negligent act, and injury results, the doctrine of *res ipsa loquitur* applies, and a plaintiff suing for an injury so caused has only to show control of the instrumentality by the defendant and its usual movements. It is then for defendant to explain, if it can, the casualty, so as to exclude negligence on its part.
10. ———: ———: ———: ———: **Erratic Street Car.** As a street car was being backed, the hind wheels went as they were intended to go and the front wheels veered off by reason of a split switch and caused the front end of the car to swing around and strike plaintiff standing on a sidewalk, the movement being one that

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could not have happened except for some defect in the car or track or some negligence in its management, and the machinery and all the appliances being peculiarly within the knowledge of defendant. *Held*, that the defendant was charged with the burden of explaining the casualty; and if by its testimony it only showed that the track, the car and the wheels were in good condition, but made no showing of what caused the split switch and the consequent erratic movement of the car, an instruction authorizing a recovery by plaintiff, if technically incorrect because it made reference to plaintiff as a passenger, is not reversible error.

11. **EXCESSIVE VERDICT:** \$20,000. Where plaintiff's injuries were unusual in severity and painfulness, rendering her a cripple for life and incapable of normal activities and life's most fruitful enjoyments, a verdict for \$20,000 is not excessive.

Appeal from Jackson Circuit Court.—*Hon. Willard P. Hall*, Judge.

AFFIRMED.

L. T. Dryden for appellant.

(1) The court erred in admitting evidence to the effect that one of the results to the respondent from the injuries alleged to have been received by her, was a lack of the regular courses of nature in her female organs. *Hall v. Coal Co.*, 260 Mo. 351; *Johnson v. Railroad*, 192 Mo. App. 8; *Shafer v. Harvey and Dunham*, 192 Mo. App. 502; *Martin v. Kansas City Rys. Co.*, 204 S. W. 589; *Wesner v. Railroad*, 177 Mo. App. 117; *Glasgow v. Railroad*, 191 Mo. 347; *Smart v. Kansas City*, 208 Mo. 162; *Taylor v. Railroad*, 185 Mo. 239; *Baldwin v. Kansas City Rys. Co.*, 218 S. W. 955. (2) The court erred in admitting evidence as to the probable ability of the respondent to give birth to a child. Authorities cited above; *Western Union Tel. Co. v. Cooper*, 10 Am. St. 772; *Pittsburgh Railroad Co. v. Story*, 63 Ill. App. 239; *Atchison Railroad Co. v. Chance*, 57 Kan. 40; *Railroad Co. v. Douglass*, 69 Tex. 694; *Augusta Railroad Co. v. Randall*, 85 Ga. 297. (3) This case should be reversed because of highly improper argument of respondent's counsel in his closing

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argument to the jury, to which timely objections were made and exceptions saved. *Western Union Tel. Co. v. Cooper*, 10 Am. St. 772; *Pittsburgh Railroad Co. v. Story*, 63 Ill. App. 239; *Atchison Railroad Co. v. Chance*, 57 Kan. 40; *Railroad Co. v. Douglass*, 69 Tex. 694; *Augusta Railroad Co. v. Randall*, 85 Ga. 297. (4) The court erred in admitting, over the strenuous objection of the appellant, the respondent to offer in evidence the deposition of Hugh Miller. *Heinbach v. Heinbach*, 262 Mo. 69; *O'Brien v. Transit Co.*, 212 Mo. 59; *State v. Miller*, 263 Mo. 326; *Dubowsky v. Binggeli*, 184 Mo. App. 364; *Schmitz v. St. Louis, I. M. & S. Ry. Co.*, 46 Mo. App. 380. (5) The court erred in giving Instruction P-1. *Pointer v. Mountain Ry. Const. Co.*, 269 Mo. 104; *Nolan v. Met. St. Ry. Co.*, 250 Mo. 602; *Nellis on St. Railways*, secs. 258, 259. (6) The verdict in this case is grossly excessive and so much so as to require a reversal. *Henson v. Kansas City*, 210 S. W. 13; 6 *Thompson on Negligence*, sec. 7355.

E. C. Hamilton for respondent.

(1) Appellant cannot be heard to complain of testimony showing impairment of the functions of child-bearing or of a lack of the regular course of nature in her female organs. (a) Because the petition alleges injury to the female organs and resulting impairment of function. *Perrigo v. St. Louis*, 185 Mo. 289; *Brake v. Kansas City*, 100 Mo. App. 616; *McRay v. Met. St. Ry. Co.*, 125 Mo. App. 570; *Patridge v. Boston Ry. Co.*, 184 Fed. 211; *Doster v. Ry. Co.*, 158 S. W. 441. (b) Because the evidence conclusively shows, and because it is a matter of common knowledge, that the chief functions of the organs within the pelvis injured and impaired in this case are essentially those of procreation with the accompanying process of menstruation. (c) Because appellant failed to avail itself in the trial court of the provision of Sec. 1846, R. S. 1909, which prescribes the way, and the only way of preserving for ap-

pellate review the complaint of a variance between the pleading and the proof, namely, the filing of an affidavit of surprise. Sec. 1846, R. S. 1909; *Mellor v. Mo. Pac. Ry. Co.*, 105 Mo. 470; *Fisher v. Real Estate Co.*, 159 Mo. 567; *Olive Street Bank v. Phillips*, 179 Mo. App. 488; *Cossitt v. Railroad Co.*, 224 Mo. 110; *Thornton v. Am. Zinc Co.*, 178 Mo. App. 42, 46; *McPike v. Motor Car Co.*, 213 S. W. 908; *Ridenhaur v. K. C. Cable Ry. Co.*, 102 Mo. 285; *Wright v. K. C. Terminal Railroad Co.*, 195 Mo. App. 486. (2) Appellant cannot be heard to complain of misconduct of counsel in the argument of the case for the reasons: (a) Defendant brings up only a fragment of the argument complained of, thus failing to show the sequence, the connection and the effect of the argument as a whole. *Lilly v. K. C. Rys. Co.*, 209 S. W. 972; *Norris v. Railroad*, 239 Mo. 721; *Wendler v. Furnishing Co.*, 165 Mo. 542. (b) For the reason that error will not be presumed from an unfinished interrupted remark in argument. *Wagner v. Const. Co.*, 220 S. W. 899; *Baird v. Larrabee Flour Mills*, 220 S. W. 992. (c) For the reason that the defendant's motion for a new trial failed to specifically point out to the trial court the language of the argument complained of in order that the court *nisi* might have corrected the error, if such there were, before appeal. *Sweet v. Maupen*, 65 Mo. 68; *Zahn v. Royal Fraternal Union*, 154 Mo. App. 83; *Lynch v. C. & A. Railroad*, 208 Mo. 42; *Honeycutt v. St. Louis Ry.*, 40 Mo. App. 678; *Stone v. Wolfskill Bros.*, 59 Mo. App. 433. (d) For the reason that mere objections to argument are insufficient unless accompanied by request for the court to rebuke counsel. *State v. Phillips*, 233 Mo. 307; *Norris v. Railroad*, 239 Mo. 720; *Wagner v. Const. Co.*, 220 S. W. 899. (3) Appellant having failed to avail itself of an opportunity to cross examine witness Miller after the reading of his deposition, cannot be heard to complain of the deposition's admissibility in evidence, especially when the evidence disclosed by it was only cumulative in nature. *O'Keefe v. Railway Co.*, 124 Mo. App. 623; *McFarlan v. Accident*

Assn. Co., 124 Mo. 222; Benjamin v. St. Ry. Co., 133 Mo. 287. (4) In view of the doctrine of *res ipsa loquitur* there was no error in the giving of plaintiff's Instruction P.-1. Thompson v. Railroad, 243 Mo. 353; Burns v. Railroad, 176 Mo. App. 338. (5) The verdict is in no sense excessive, considering the horrible nature and permanency of plaintiff's injuries especially in view of the increased cost of living and the decreased purchasing power of money at the time the verdict was rendered. Greenwell v. C. M. & St. P. Ry. Co., 224 S. W. 410; Wagner v. Const. Co., 220 S. W. 899; Myers v. City of Independence, 189 S. W. 816; Barry v. Cape Girardeau, 132 Mo. App. 189; Stottler v. Railroad, 200 Mo. 148; Roe v. Met. St. Ry. Co., 131 Mo. App. 134.

WHITE, C.—The appeal is from a judgment for \$20,000 recovered by the plaintiff as damages on account of personal injuries.

Lexington Street, Independence, runs east and west. It is intersected by Orange Street running north and south. The defendant's street railway tracks run along Lexington Street; a track comes in from the north on Orange Street, and turns into a track on Lexington Street. After turning from Orange into Lexington Street, a car stands to receive passengers in front of the post office, which is on the north side of Lexington Street.

On December 24, 1917, a car of the defendant came from the north on Orange Street and turned the curve into Lexington Street, heading towards the west. A number of persons, including the plaintiff and her sister, were waiting at that point in front of the post office to take passage on a car going west. Some of those persons immediately boarded the car. It was then announced by the conductor in charge that the car would not go on west. Such passengers as had boarded the car got off. The switch connecting the track coming in from Orange Street with the Lexington Street track was thrown, and the motorman attempted to back the car eastward on the track on Lexington Street. The rear

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trucks of the car passed on east, but the switch then became "split," as it was termed, so that the front trucks of the car, instead of going east, turned northward as if to pass on to the track on Orange Street. That caused the front end of the car to swing around in a sweep toward the curb on the north side of Lexington Street and against the crowd of persons waiting to take passage. The end of the car, swung so far, the evidence shows, that it struck an iron post which stood between the curb and the sidewalk at the northwest corner of Lexington and Orange. It struck a number of persons, knocking several down, and three women at least had to be picked up by other persons. The plaintiff's sister was dragged from under the car when it stopped; the plaintiff was struck and crushed over against the iron post mentioned, or against the curb. According to the evidence, when the car stopped the fender either was against the post, or very close to it. The fender was injured and had to be removed. Whether its removal was made for the purpose of getting the persons from under it, or whether the car could not proceed with it in that condition, does not appear from the evidence.

The number of persons at the point waiting to board the car was variously estimated at from a dozen to thirty. A number of them testified, and all substantially to the same effect, as to the movement of the car in taking the split switch, the swinging around of the front, and the crashing into the throng of people. Among the witnesses was the motorman in charge of the car, whose testimony was offered by the plaintiff. The defendant offered evidence to show that the wheels of the car and other parts were in good condition. The evidence tended to show that the split switch might have been caused by various means, by a defective wheel, broken flange, obstruction in the track, or too rapid backing of the car.

The injuries of the plaintiff were of the most serious character. Her hip was torn from the socket; the bones in the region of the hip were fractured in five or six places. The technical names of those various bones were given and the condition explained by surgeons who at-

tended the patient and took X-Ray pictures of them. The bones were thrust out of place and grew together again in a misplaced condition, so that the result was an abnormal contraction of the pelvic cavity and the birth canal. It was testified that it would afterwards be impossible for the plaintiff to give birth to a normal child. Some of the bones overlapped, so that there was painful and defective locomotion. One fragment of bone was thrust downward, so that it was impossible for her to sit comfortably except upon a pillow; other fragments were thrust into the pelvic cavity, causing painful menstruation. The expert evidence showed that it was impossible properly to set the bones; the only thing that could be done was to reset the hip joint which had been torn from its socket. There was no way known to the surgeons by which the broken and crushed bones in that region could have been replaced in their normal condition. Such injuries, the surgeons said, usually were fatal, although the plaintiff survived. The movement of the plaintiff's right leg was impaired, and when she walked, one with hand on her hip could feel the click-click of the bones. She walked painfully and with crutches. She was in a sanitarium undergoing treatment for about ten weeks, and afterwards was enabled to move around with difficulty. At the time of the trial, some fourteen months after the injury, she still went on crutches a great part of the time, used her muff or a pillow to sit on, was able to do very little, and only the lightest housework, whereas before her injury she was in good health, and did all her own housework. It was the opinion of physicians that her injury was permanent, with no possibility of any substantial relief. No attempt was made by the defendant to minimize the injuries which she was shown to have suffered.

I. The appellant asserts that the trial court erred in allowing the plaintiff to prove her inability, after the accident, to give birth to a child. The allegations of the petition relating to the nature of the injuries received are as follows: "The

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lower part of her body about the hips was crushed, the right pubic bone fractured, the left pubic bone fractured, the right ischium was broken, the left ischium broken, and the back of her hips so mashed and crushed as to tear loose the right osinominata from its articulation with the sacrum; the left hip was torn, wrenched and dislocated, resulting in a rupture, strain and wrench of the ligaments thereto attached; the organs within the cavity of the pelvis were crushed and injured, including the bladder, the functions of all of which said organs have been seriously and permanently impaired; that the tender nerves, blood vessels and tissues within the pelvis, and surrounding and adjacent to said injured parts have been torn, lacerated and injured, and their functions permanently impaired; that she has sustained a lasting and permanent shock to her whole physical and nervous system, which has been shattered, wrenched and permanently impaired."

It is argued that these allegations were not sufficient to allow the introduction of such evidence, because there is no specific mention of that particular impairment in the injured organs. The case of *Hall v. Coal Co.*, 260 Mo. 351, is cited by appellant in support of the position, where it is held that when the petition alleges special damages in a personal injury case, the proof must be limited to the special damages pleaded; that where a specific result necessarily follows from a stated injury it is not necessary to plead it, but where it is the natural but not the *necessary* result of the injury it would have to be pleaded in order to admit evidence of it. As an illustration used in the *Hall Case*, l. c. 373, an injury to the lungs might result in pneumonia, but not necessarily so, and such result would have to be pleaded before it could be proved.

Some uncertainty appears in some of the cases in the use of the expressions "general damages" and "special damages." This arises from confusing the facts constituting a specific injury with the resultant damages which flow from it. If an allegation of dam-

age contains a general term in describing what follows the injury, then any result coming within the content of that term might be proven without specific allegation. For instance, an allegation that the injury caused the lung to be diseased would let in evidence of pneumonia. If the defendant in such case were not satisfied with the pleading he could move to make more specific. This is particularly explained in the Hall Case, for instance, l. c. 371, it is said: "It will be noticed that the petition fails to specifically allege impotency, neither does it contain an allegation of a *general nature* which might be said to embrace within its terms the condition of impotency."

The opinion then goes on to point out that in the petition in that case the defendant could not help the situation "by filing a motion to make more specific, because the petition contains no *general terms* which would by being made more specific uncover the hidden secret that impotency resulted from the injury."

Applying that principal to this case, to simply allege that the bones surrounding the pelvic cavity were broken and crushed, and the organs within the cavity crushed, is a description of the facts constituting the injury; it would not necessarily follow from that statement of the injury that the woman would thereafter be unable to give birth to a child; but the allegation instead of stopping with the description of the injury goes on to state the results in general terms; the allegation, after describing the broken condition of the bones and the dislocation and rupture of the ligaments, then alleges: "the functions of all of which organs have been *seriously and permanently impaired.*" One of the functions of these organs so impaired was child-bearing. If the defendant desired a more specific definition of the particular impairment meant, a motion to make more specific was available. Or, if after describing the nature of the injury and the impairment of the organs the plaintiff had gone on and specifically had enumerated the particulars in which the organs were impaired, she

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probably would not have been allowed to prove any other than these particulars enumerated. Recent cases have considered this subject and support the position taken here. [Ganz v. Met. St. Ry. Co., 220 S. W. 490, l. c. 496; Martin v. Kansas City Rys. Co., 204 S. W. 589, l. c. 590; Bergfeld v. Dunham, 202 S. W. 253, l. c. 254.]

The case of Hibbler v. Kansas City Railways Co., 237 S. W. 1014, decided at this term of court, differs from the case under consideration in that very particular. In that case there was an allegation of the *impairment* of functions of certain organs; it was held improper to show a *destruction* of such organs, making it necessary to have them removed by operation, because destruction is not embraced within the general term impairment. The evidence was not improper and comes within the general allegations of resultant injuries.

II. Error is assigned to the admission of the deposition of witness Hugh Miller. The deposition was offered by the plaintiff and read in evidence. Miller testified that his home was with his parents in Independence, but at the time his deposition was taken he was in the military service in the U. S. Army and stationed at Camp Funston; had been there for six months and had not been discharged. He didn't know when he would be able to come back to Independence. The date of the deposition is not stated so as to determine how long it was taken before it was offered in evidence. The plaintiff's attorney, Mr. Hamilton, was sworn and testified that he had had correspondence with the witness at Camp Funston and he was willing that the counsel on the other side should see the correspondence. On that showing the deposition was read in evidence over the objection of the defendant.

The statute, Section 5467, Revised Statutes 1919, provides that depositions may be read in evidence "if the witness resides or is gone out of the State; . . . if he reside in a county other than that in which the trial is held, or if he be gone to a greater distance than

forty miles from the place of trial without the consent, connivance or collusion of the party requiring the testimony.”

The facts which would authorize the reading of the deposition may be established by the testimony of the deposing witness or the certificate of the officer taking the same. It was held by this court in the early case of *Gaul v. Wenger*, 19 Mo. 541, that the mere statement of the witness in his deposition that he was going to leave for Europe tomorrow would not be conclusive so as to authorize his deposition to be read, in the absence of other proof, but that slight evidence might be offered to show that the witness had carried out his purpose so as to make the deposition competent. [See, also, *Moudy v. Dressed Beef and Provision Co.*, 149 Mo. App. 413, 1. c. 422.] In this case the witness not only said he was going away, but that he was stationed away. There was additional positive proof that his present residence and duty kept him in another State, at Camp Funston. If he should return to Independence it would be because of a leave of absence. We think the evidence justified the court in admitting the deposition.

However, another complication arose; after the deposition was read it was discovered that the witness was in Independence at the time. Mr. Hamilton, attorney for the plaintiff, was sworn and stated that he was misled as to the whereabouts of the witness, didn't know he was in the city, and he was ready to withdraw the deposition and allow the witness to testify. Mr. Dryden, counsel for defendant, declined to make any statement. The witness then was sworn and it was suggested by the plaintiff's counsel that the defendant's counsel cross-examine him. Defendant's counsel declined to cross-examine him unless he was examined in chief. Thereupon the plaintiff's counsel had him testify giving his name, and upon objection by defendant's attorney examined him no further. Defendant's counsel declined to cross-examine him.

From the fact that the deposition was competent when offered, the question arises as to whether it would

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be rendered incompetent by showing subsequently that the court was in error in the first place in ascertaining the facts as to its competency. It is unnecessary to decide that question, because the defendant could not possibly be harmed by the deposition; the witness himself was present and placed upon the stand for the purpose of allowing the defendant to cross-examine him. Defendant had every advantage in the situation as it stood. He could cross-examine the witness at length and with particularity as to everything he had said in his deposition, and if there were any misstatements in that deposition they could have been corrected. There was no reversible error in allowing the deposition to stand.

III. Error is assigned to the action of the trial court in permitting—over the objection of defendant's counsel—plaintiff's counsel in his argument to the jury, **Argument to Jury.** to comment upon the inability of the plaintiff to bear children, and her mental suffering on account of such condition. The comment upon the fact was not improper since the evidence of that condition was properly admitted, as shown above. The objection to the argument was that it made reference to a matter, mental suffering, without the issues. Mental suffering as an incident to personal physical injury is always an element of damage to be considered by a jury, and it is unnecessary to make specific proof of mental suffering because it necessarily arises when the nature and extent of the physical injury is shown. [Brown v. Hannibal & St. Joe Ry. Co., 99 Mo. 310, l. c. 319; Wingate v. Buntton, 193 Mo. App. 470; Maguire v. St. Louis Transit Co., 103 Mo. App. 476.] The comment was entirely within the scope of the issues and the evidence.

IV. The appellant complains of error in the giving of instruction P-1, on behalf of the plaintiff. This was the principal instruction given for plaintiff, **Instruction.** and required the jury to find: "That if the plaintiff, Emma E. Mayne, had gone to said place intending to board one of defendant's street cars, and to become a passenger thereon, and if she was ready, able and

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willing and intended to pay her fare for passage, and if the place where she went to board said car was near the regular stopping place for taking on such passengers and while she was in the exercise of ordinary care for her own safety," etc., then follows the requirements to find the movement of the car as indicated by the evidence, and the instruction proceeds:

"Then you are instructed that such an occurrence creates a presumption of negligence for which defendant is liable, and the burden is upon the defendant to disprove such presumption by a preponderance of the evidence."

It is claimed by appellant that this is not a *res ipsa loquitur* case, and that the instruction is erroneous in declaring the plaintiff's case is made out by showing the injury took place by the movement of the car, without showing specific negligence. It is further urged that the instruction is faulty, because it assumes that the plaintiff was a passenger.

As to the last objection, the instruction only requires the jury to find that plaintiff went to the usual place for receiving passengers intending to become a passenger. It neither assumes that fact nor requires it to be found; nor does it matter whether the plaintiff was a passenger or not in determining whether the doctrine of *res ipso loquitur* would apply.

Where the instrumentality which causes and injury is within the control of and operated by a party, and moves or operates in such a way that such motion or operation would not have happened except for some defect or negligent act, and injury to some person results, then the doctrine of *res ipsa loquitur* applies, and a plaintiff suing for an injury so caused has only to show control of the instrumentality by the defendant and its usual movements. It is then for the defendant to explain, if it can, the casualty, so as to exclude negligence on its part. [Ash v. Woodward Printing Co., 199 S. W. 1. c. 997; Blanton v. Dold, 109 Mo. l. c. 75; Thompson v. Railroad, 243 Mo. 336, l. c. 354; Gibler v. Railroad, 148 Mo. App. 475, l. c. 484.]

In the Thompson Case, 243 Mo. l. c. 354, it is said: "This maxim (the act speaks for itself) is founded upon the feeling that every apparent wrong resulting in injury to another which may only be palliated or explained by facts within the peculiar knowledge of the perpetrator, carries with it the proof of its wrongful character and places upon him the burden of offering a just excuse."

Here the street car took a most unexpected course, the back wheels going as they were intended to go and the front wheels veering off by reason of the split switch and causing an unusual and dangerous movement of the car. This was a movement that could not have happened except for some defect in the track or car, or some negligence in its management. The machinery and all appliances were peculiarly within the knowledge of the defendant and the defendant was charged with the burden of explaining. Defendant introduced several witnesses for the purpose of showing that the track, the car, and the wheels were in good condition, but offered no evidence to show exactly what caused the split switch and the consequent erratic movement of the car. Therefore the instruction if technically incorrect was harmless.

V. Complaint is made that the verdict is excessive. The injuries were unusual in severity and painfulness, rendering the plaintiff a cripple and more or less incapable of normal activities and enjoyment for life. This court has in recent cases allowed verdicts for persons injured to stand for amounts larger than the amount recovered here where the injuries were no more aggravated than these. [Smith v. Kansas City So. Ry. Co., 279 Mo. 173.]

The judgment is affirmed. *Railey and Mozley, CC.*, concur.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

AURA L. MEREDITH et al., Appellants, v. MINNIE E. MEREDITH.**Division Two, April 7, 1921.**

1. **CONVEYANCE: Deposit of Deed With Bank: Agent or Trustee.** The physical delivery of a deed to a bank, accompanied by written instructions that it was to be delivered to the grantee upon the grantor's death, and the grantor's contemporaneous and subsequent declarations to the effect that he had deeded everything he had to the grantee and wanted her to have it at his death, created no relation of agency between the bank and the grantor, but the deposit being unconditional the bank, in accepting it, became a trustee of an express trust and as such charged with the performance of the duties defined for the grantor and the grantee.
2. ———: ———: **Delivery Upon Grantor's Death.** A delivery of a deed by the grantor to a third party to be held by him and delivered to the grantee upon the grantor's death will operate as a valid delivery, where no reservation is made in the deed nor any right of control over the instrument is retained by the grantor.
3. ———: ———: ———: **Retaining Possession of Land.** A deed, unconditional in its terms and beyond the control of the grantor after its delivery to a depositary with specific directions to deliver it to the grantee upon his death, although not conferring an immediate right of present possession, constitutes such an investiture of title as to give the grantee a present fixed right of future enjoyment, although the use of the land is retained by the grantor during his life.
4. ———: ———: ———: **Acceptance.** Acceptance of a deed after the grantor's death dates back to the time of its delivery to the depositary, and renders it a transfer of the title as of that date.
5. ———: ———: **Evidence of Agency.** The cashier having defined his relation to the grantor, showing that it was in no wise different from that sustained by him to other patrons of the bank, it was not error to exclude testimony tending to show that the cashier was the agent of the grantor throughout the transaction by which the grantor delivered to him a deed to be delivered to the grantee upon the grantor's death.
6. **INSTRUCTIONS.** Declarations of law based upon false assumptions of fact do not correctly declare the law, and should be refused.

Appeal from Knox Circuit Court.—*Hon. James A. Cooley*,
Judge.

AFFIRMED.

J. C. Dorian and Higbee & Mills for appellants.

(1) The court erred in refusing the offer to prove by Anderson that he held the deed and notes as agent for the grantor. (2) The court erred in refusing plaintiff's declaration of law. The deed was incorporated in the memorandum, and was testamentary. *Shulsky v. Shulsky*, 98 Kan. 69; *Goodale v. Evans*, 263 Mo. 219; *Bryan's Appeal*, 68 L. R. A. 354, note. (3) The court erred in refusing plaintiff's declaration of law No. 2. This is an action at law. *Hayes v. McLaughlin*, 217 S. W. 262; *Van Valkenburg v. Allen*, 126 N. W. 1092; *Williams v. Latham*, 113 Mo. 165; *Gomel v. McDaniels*, 269 Ill. 362; *Linn v. Linn*, 261 Ill. 606; *Hayden v. Collins*, 81 Pac. (Cal.) 1120; *Anderson v. Messenger*, 158 Fed. 250, 85 C. C. A. 468. (4) The burden was on defendant to prove that the grantor delivered the deed irrevocably and beyond his control. This she did not do. The circumstance in evidence show that Meredith retained control of the deed. The court erred in not rendering judgment for the appellants. See cases cited under Point 3. (5) The deed was delivered by the grantor to Anderson, his agent, in trust and for safe keeping for him, and not to a third party. It was under his control, and not in escrow for the respondent. The court erred in not finding for the appellants. *Zimmerman v. Zimmerman*, 161 N. W. (Wis.) 369; *Schooler v. Schooler*, 258 Mo. 83; *Sneathen v. Sneathen*, 104 Mo. 201; *Whitely v. Babcock*, 202 S. W. 1091; *Cole v. Cole*, 108 N. W. (Mich.) 101; *Grilley v. Grilley*, 18 Conn. 380, 4 L. R. A. (N. S.) 816; *Terry v. Glover*, 235 Mo. 544.

Arthur V. Lashly and Stewart & Stewart for respondent.

(1) The delivery of the deed to Anderson, cashier of the Home Bank, by Meredith was a valid delivery for

the benefit of the wife, and the delivery by it to her and her acceptance thereof, after the death of the grantor, relates back to the time when the deed was first delivered to the bank and makes it a transfer as of that date. *Sneathen v. Sneathen*, 104 Mo. 209; *Williams v. Latham*, 113 Mo. 165; *Burkey v. Burkey*, 175 S. W. 624. (2) The grantor made no reservation of control over the deed when he delivered it to the bank for Minnie E. Meredith and therefore the delivery was absolute and could not be recalled. *Williams v. Latham*, 113 Mo. 174; *Sneathen v. Sneathen*, 104 Mo. 209; 18 C. J. par. 113, p. 208; *Seibel v. Higham*, 216 Mo. 132; 2 *Jones on Real Property* (1896 Ed.), p. 220, par. 1309. (3) Much more is presumed in favor of the delivery of the deed in cases of voluntary settlement upon members of the grantor's family, than is presumed between strangers. *Crowder v. Searcy*, 103 Mo. 118; *Rumsey v. Otis*, 133 Mo. 95; *Schooler v. Schooler*, 258 Mo. 92. (4) In an action at law, if there were any legal grounds supported by substantial evidence, which justifies the court's findings, the judgment must be affirmed. *Thompson v. Stillwell*, 253 Mo. 94. (5) The court was not in error in refusing to permit the witness Anderson to testify that he held the deed as agent for the grantor..

WALKER, J.—This is a suit brought under Section 2535, Revised Statutes, 1909 (now Sec. 1970, R. S. 1919), to try and determine the title to certain land in Knox County. On a trial to the court there was a judgment for the defendant, from which plaintiffs have appealed.

William T. Meredith, the common source of title, died intestate, without issue, May 29, 1917. The plaintiffs are his only heirs, and the defendant is his widow. On March 15, 1916, he executed and delivered to the cashier of a bank at Knox City a warrant deed conveying to his wife, the defendant, for a valuable consideration, the land in controversy. At the time of the execution of this deed the grantor gave certain instructions to the cashier as to its disposition. These instructions were at

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the time reduced to writing by the cashier, and upon being approved and signed by the grantor were enclosed in a sealed envelope with the deed and, as directed, deposited in the vault of the bank. These instructions are as follows:

“Knox City, Mo., March 15, 1916.

“To Home Bank, Knox City, Mo.

“You are hereby handed a warranty deed to the north one-half of the northwest quarter and the northwest fourth of the northeast quarter of Section 32, Township 62, Range 10, west, made to my wife, Minnie E. Meredith, to be held in trust and for safe keeping, until my death, then said bank is to deliver said deed with all other personal property belonging to her (Minnie E. Meredith) that is in said bank at my death.

“WM. T. MEREDITH.”

The grantor never had the deed in his possession or attempted to secure possession of it or made any inquiries concerning it after he delivered it to the cashier. On the day succeeding the grantor's death, the cashier delivered the deed to the defendant, pursuant to the instructions of the grantor. Subsequent declarations by the grantor to others several months after the execution and deposit of the deed were to the effect that he had deeded everything he had to his wife and at his death he wanted her to have it.

Testimony on the part of plaintiffs was to the effect that after the making of the deed the grantor continued until the time of his death to lease, cultivate and otherwise control the land conveyed. The relation sustained to the grantor by the cashier before, at the time of and subsequent to the execution of the deed is thus described by the latter: “He was a customer at the Home Bank and I carried out requests he made from time to time. Whatever he wanted me to do I would do like I did for any other customer.” It was attempted to be proved on a cross-examination of the cashier by plaintiff's counsel, but excluded, that the cashier was the agent of the grantor in all of the business transacted for the grantor

by him. In addition, the cashier testified that if the grantor had, subsequent to the execution of the deed, asked to withdraw it, he thought he would have permitted him to do so. Testimony was also offered, but excluded, to show by the cashier that in all these transactions he was acting as the adviser and business friend of the grantor, and that he knew nothing of and had no business relations with the grantee and that in the matter of the deed he was acting as agent and solely for the grantor.

I. The intention of the grantor in executing the deed to his wife and depositing the same in the bank for delivery to her upon his death is to be determined from not only his acts and declarations but as in any other case in which it is sought to define a purpose from all of the other relevant facts and circumstances. The physical delivery of the deed to the bank and the grantor's contemporaneous and subsequent declarations in regard thereto, as well as his express written directions prepared at his instance and deposited with the deed, offer cogent evidence of such a delivery as the law contemplates in effecting a conveyance of real estate. It is true the cashier occupied a relation to the grantor somewhat in the nature of an intermediary, but in the light of his testimony and other pertinent facts, it does not appear that he was other than an instrumentality acting for the grantor to effect the transfer and to authorize the bank to accept and hold the deed until the grantor's death, whereupon the legal delivery of the deed, if then consummated, would become actual by its physical transfer to the grantee. While the oral declarations and physical acts of the grantor are, in our opinion, ample to prove the grantor's intention to deliver the deed, his written declarations add to their probative force, and at the same time, by the very terms of the directions, define the relation of the bank to the relator and dissipate the assumption sought to be established as a fact that it was the grantor's purpose in the making and depositing of the deed to create a trust in

Grantor's
Purpose.

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his own property for his own benefit. The directions declare that the deed is to be held in trust by the bank for safe keeping until his death. If the directions ended here they would disclose no well-defined purpose on the part of the grantor, but they do not end here. Explicitly definitive of the grantor's purpose immediately succeeding the direction as to the deposit, is the following: "Then the bank is to deliver said deed with all other personal property belonging to her (Minnie E. Meredith) that is in said bank at my death." The grantor owned the fee in the land. It was shadowed by no lien and burdened by no incumbrance. This condition of the title discloses no reason in harmony with human experience for the creation of a relation of agency between the bank and the grantor or, incidentally, between him and the cashier for other than the purpose declared in the written directions. The deposit of the deed having been made unconditionally, the bank in accepting the same became not an agent but a trustee of an express trust and as such charged with the performance of the duties defined for the grantor as well as the grantee. [Seibel v. Higham, 216 Mo. 121.]

II. The relations of the parties and the intention of the grantor to deliver the deed having been defined, it remains to be determined whether his acts constitute a delivery. While it is necessary to the conveyance of land by deed that the grantor delivered the same to the grantee with the intent to pass the title, it is not necessary that the actual transfer of the instrument be made by one of these parties to the other. A delivery to a third party to be held by him and delivered to the grantee upon the grantor's death will operate as a valid delivery when there is no reservation in the deed nor any right of control over the instrument retained by the grantor. The deed, by his own act, having passed beyond his control, accompanied by the declaration that it was delivered for the use and benefit of the grantee, has the same effect in the hands of the custodian as if it had been manually delivered by the grantor to

the grantee. [Schooler v. Schooler, 258 Mo. 83; Terry v. Glover, 235 Mo. 544; Seibel v. Higham, *supra*; White v. Pollock, 117 Mo. 467; 18 C. J. p. 208, sec. 114; 2 Jones, Real Prop. (1896) p. 220; Cannon v. Cannon, 26 N. J. Eq. 316.]

The deed at bar, unconditional in its terms and beyond the control of the grantor upon its delivery to the bank, although not conferring an immediate right of present possession, constituted such an investiture of title as to give the grantee a present fixed right of future enjoyment although the use of the premises was retained by the grantor during his life. [O'Day v. Meadows, 194 Mo. 588; Headington v. Woodward, 214 S. W. 963.]

The manual delivery of the deed to the grantee by the depositary upon the death of the grantor and its acceptance by the grantee, leaves no room for controversy concerning this fact. The time of the acceptance will not affect the validity of the transfer. **Acceptance.** Burkey v. Burkey, 175 S. W. 1. c. 624.] Acceptance after the death of the grantor dates back to the time of the delivery of the deed to the bank and renders it a transfer as of that date. [Williams v. Latham, 113 Mo. 165; Sneathen v. Sneathen, 104 Mo. 1. c. 209.]

III. There was no error in the exclusion of the testimony sought to be introduced by plaintiffs as tending to show that the cashier was the agent throughout this transaction of the grantor. The witness had defined, both on direct and cross-examination, his relation to the grantor, which showed that it was in no wise different from that sustained by him to other patrons of the bank. The court properly held that the conduct of the parties was sufficient from which to determine their relations towards each other without the witness being required by name to designate the same, which would have constituted but a conclusion and not the statement of a fact.

IV. The refusal of certain declarations of law asked by plaintiffs did not constitute error. They were based

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upon false assumptions of fact and did not, therefore, correctly declare the law.

There was no prejudicial error committed in the trial of this case. The judgment was for the right party and it is affirmed. All concur, except *Higbee, P. J.*, not sitting.

JOSEPH BOYLE PRICE, Administrator of Estate of
EMELINE G. BOYLE, v. SIDNEY E. BOYLE, Ex-
ecutrix of Will of WILBUR F. BOYLE, Appellant.

Division Two, April 7, 1921.

1. **EVIDENCE: Statement Called For by Memorandum.** Where a so-called declaration of trust recites that the maker has this day rendered the beneficiary and her daughter "a statement setting forth in full all assets of the estate, including the amount which appears in the probate court," such statement, submitted with the declaration of trust, is of equal value as evidence.
 2. ———: ———: **Common Experience.** Where the executor of his father's will, which gave to the widow a life estate in all the property, had made four annual settlements which showed he had paid the widow an average of \$1391.10 annually, and at the time of the final settlement, made eighteen months after the fourth settlement, he gave to her a written memorandum which recited he had received from her a receipt for \$4,241.10, to be filed with the final settlement, "yet as a matter of fact I have not paid this amount of money to her, and have obtained her receipt simply for the purpose of closing up the administration in the probate court," and further recited that he had "this day rendered" to her and her daughter "a statement setting forth in full all the assets of the estate, including the above amount which appears in the probate court," reason and common sense must be allowed their common functions, if resort must be had to evidence outside the probate court to impeach the final settlement, and it is contrary to reason that the executor should have paid his mother nothing to live on during said eighteen months, and the "statement" mentioned in the declaration showing that during about six months of the eighteen he had paid her \$762, the presumption must be indulged that he paid her a corresponding amount during the other twelve months, and there being no other evidence that he
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appropriated the \$4,241.10 mentioned in the memorandum, his executrix cannot, after his and his mother's death, and nearly forty years after the final settlement, be charged, in a suit for an accounting brought on the theory that he was a trustee of an express trust, with the whole of said \$4,241.10.

3. ———: **Sale of Trust Property: Consideration Recited in Deed.**

A consideration recited in the trustee's deed conveying property to a purchaser is prima-facie evidence of the real consideration, and holds until the contrary is shown. But where the property in 1875 rented for about \$1000 a year, which indicated a value of about \$17,000, evidence that by 1890 the neighborhood had become bad, that the rents had decreased to \$250 a year, and that it was in 1897 traded for other real estate, is some evidence that the recited consideration of \$17,000 was not the real consideration, for it is a well known fact that, in trading real estate, the consideration mentioned in the deed is often not the cash value.

4. **TRUSTEE: Accounting to Cestui Que Trust** A trustee in charge of trust property must account to his *cestui que trust*, and he is accountable on the termination of the trust at her death; and in a suit for an accounting brought against his executrix, it is significant that there is no showing that he did not account at the death of the *cestui que trust*, although he survived her four years; without such a showing, it is a matter of grave doubt whether plaintiff makes out a prima-facie case.

5. **LACHES: Unreasonable Delay.** Where a party rests upon his rights, and fails to bring a suit when he might have done so, for a period short of the period of limitations, in a proceeding in equity, relief may be denied on the ground of unreasonable delay, where circumstances intervene to work hardship upon defendant in making his defense. Where, by reason of delay, evidence becomes unavailable, or important witnesses have died and it becomes impossible to ascertain the facts, laches will bar recovery.

6. ———: ———: **Accounting by Trustee.** Where the administration of the estate closed in 1877, and the trustee, who was executor, if he appropriated any of the life estate, began to do so during that administration, and the *cestui que trust*, then sixty years of age, made no complaint; there was no complaint during the subsequent thirty years, but letters were introduced breathing the greatest confidence in him on the part of the *cestui que trust* and her daughter; there was no intimation that the mother during said thirty years was not entirely satisfied with his management of the estate; after her death in 1907, and his in 1911, all that remained to show the state of the account were the public records and such statements as he had rendered his mother during her

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lifetime; such statements in detail rendered during several years of his trust were produced in evidence, which indicates that other statements covering the rest of the time were rendered; her daughter had possession of all papers her mother possessed relating to the estate, and she testified that she destroyed most of those papers; no account book was presented; the suit for an accounting was brought by the administrator of the *cestui que trust* four years and 364 days after her death, and at the instigation of her daughter, who was disappointed in the provisions of the trustee's will, and was brought more than a year after his death; by the suit it is attempted to charge him with the consideration mentioned in a deed for real estate exchanged for other property, and the trustee alone could explain whether such named sum was the real consideration, and the only evidence that he had not accounted in full for the trust estate is the fragmentary papers which his sister had neglected to destroy when she destroyed the other statements rendered, it will be held that the suit is barred by laches.

Appeal from St. Louis City Circuit Court.—*Hon. A. B. Frey, Judge.*

REVERSED AND REMANDED (*with directions*).

Boyle & Priest for appellant.

(1) The suit must fail for lack of proof sustaining the charge and for laches. *Hinchman v. Kelley*, 54 Fed. 63; *State ex rel. v. Collier*, 15 Mo. 293; *Ladd v. Stephens*, 147 Mo. 342; 39 Cyc. 476; *McCreery v. First Nat. Bank*, 47 S. E. 890; *Gee v. Hicks*, Rich. (S. C.) Eq. Cases, 5; *Chamberlayne on Modern Law of Evid.*, sec. 1219; *Jones on Evid.* (2 Ed.) sec. 12. (2) The legal presumptions are against the right of recovery. As length of time generally obscures evidence and deprives parties of the means of ascertaining the nature of the original transactions, it operates by way of presumption in favor of innocence and against the imputation of fraud. *Alston v. Hawkins*, 18 Am. St. 879, 888; *Dixon v. Gourdin*, 1 L. R. A. 628; *Kellogg v. Dickinson*, 1 L. R. A. 346; *Beekman v. Hamlin*, 10 L. R. A. 454; *Foulk v. Brown*, 2 Watts (Pa.) 209, 215; *Bean v. Tonnelle*, 94 N. Y. 381, 46 Am.

Rep. 153; 1 Jones on Evid. (Horwitz) secs. 65, 68, 78; Prevost v. Gratz, 6 Wheat. (U. S.) 481; 2 Notes on United States Reports, 92; Hinchman v. Kelley, 54 Fed. 63, 65; James v. James, 41 Ark. 301.

Joseph H. Zumbalen and W. B. & Ford W. Thompson for respondent.

(1) The land on McPherson Avenue, which is the basis of the first count of the petition, was obtained by W. F. Boyle by quitclaim deed from the widow, May 22, 1875, at which date the widow was the owner of a life estate therein under the provisions of the will of Joseph Boyle. The grantee in this quitclaim deed was her son, also a practicing lawyer and her sole and only legal adviser, and was at the time also the duly appointed and acting executor of the will of said Joseph Boyle, and as such had taken charge of this piece of real estate, together with the balance of the real estate belonging to the estate, from which he was collecting the rents, paying the taxes, also the allowed claims and expenses of administration, and reporting the same to the probate court, and claiming and being allowed a five per cent commission upon disbursements so made by him. He was, therefore, at the date of acquiring this property from the widow for an inadequate consideration of but five dollars, trustee of the express trust created by the will of his father, Joseph Boyle. Therefore the rules of law relative to a trustee of an express trust are applicable to such transaction. (2) As between the *cestui que trust* and the trustee the Statute of Limitations can never run. Davidson v. Davidson, 262 S. W. 493; Coal Co. v. Squier, 219 S. W. 693; Moulden v. Train, 199 Mo. App. 509, 204 S. W. 65; Ruby v. Barnett, 12 Mo. 9; Dillon's Admr. v. Bates, 39 Mo. 301; Elliott v. Machine Co., 236 Mo. 567; Case v. Goodman, 250 Mo. 114, 115; Canada v. Daniels, 175 Mo. App. 68; Dyers v. Waters, 46 N. J. Eq. 484; Oliver v. Piatt, 3 How. 411; Poe v. Domic, 54 Mo. 127; Newton v. Re-

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benack, 90 Mo. App. 659; Smith v. Riceras, 52 Mo. 582; Goodwin v. Goodwin, 69 Mo. 621; Butler v. Lawson, 72 Mo. 249. (4) Laches and the Statute of Limitations are both affirmative defenses, and if intended to be interposed as such, must be pleaded, and the facts relied upon as constituting such defense must be stated. The pleadings in this case show no such defense. (5) All agreements or contracts between trustee and *cestui que trust* are looked upon with suspicion by the court and are closely scrutinized. Therefore, in order that a release, confirmation or acquiescence may have any effect, the *cestui que trust* must be shown to have had full knowledge of all the facts and circumstances of the case; he must also know the law and what his rights are, and their value, and how they would be dealt with by the court. 2 Perry on Trusts & Trustees (6 Ed.), pp. 1394, 1395, and cases under Point 2. (3) In order to bind a *cestui que trust* by acquiescence in a breach of trust by the trustee, it must appear that the *cestui que trust* knew all the facts and was possessed of his legal rights and was under no disability to assert them. Such proof must be full and satisfactory. The *cestui que trust* must be shown, in such case, to have acted freely, deliberately and advisedly, with the intention of confirming a transaction which he knew, or might or ought with reasonable or proper diligence to have known, to be impeachable. His acquiescence amounts to nothing if his right to impeach is concealed from him, or if a free disclosure is not made to him of every circumstance which it is material for him to know. Garesche v. Levering Inv. Co., 146 Mo. 436; Newton v. Rebenack, 90 Mo. App. 650; Bank v. Kennett Estate, 101 Mo. App. 370; White v. Sherman, 168 Ill. 605; 1 Bigelow on Fraud, pp. 315, 316; 2 Perry on Trusts and Trustees (6 Ed.), pp. 1394-5; Butler v. Lawson, 72 Mo. 249; Chouteau v. Allen, 70 Mo. 343; Rutter v. Carothers, 223 Mo. 640; Perry on Trusts and Trustees (6 Ed.), sec. 850, p. 1393.

WHITE, C.—This is a suit in equity, and as originally filed the bill was in two counts: In the first count the plaintiff sought to set aside a certain deed executed in May, 1875, wherein the plaintiff's intestate conveyed certain property to the defendant's testator; the second count demanded an accounting of the trusteeship of Wilbur F. Boyle, deceased, concerning certain property which it is alleged he held in trust for plaintiff's intestate.

By consent of the parties William B. Homer was appointed referee to try the issues involved. It was stipulated that he should take the evidence, but make no finding of facts. Accordingly the referee took the evidence, reported the same, and upon the consideration of that evidence the trial court rendered judgment for the defendant on both counts, Judge F. L. English, being judge. Subsequently a motion for new trial was filed, and at that time Judge A. B. Frey had succeeded Judge English. Judge Frey overruled the motion as to the first count, and sustained it as to the second count. From that order sustaining the motion for new trial on the second count the defendant appealed.

Emeline G. Boyle was the widow, and Wilbur F. Boyle the son, of Joseph Boyle, deceased. Joseph Boyle died in 1872, leaving a will in which he appointed Wilbur F. Boyle his executor. He had two other children—Leonidas H. Boyle, a son, and Virginia, a daughter. At the time of her father's death Virginia was the wife of William M. Price; previously, she had been married to one McDonald, who died in 1868. The defendant, executrix, is the daughter of Wilbur F. Boyle, deceased. It is claimed by plaintiff that Emeline G. Boyle was devised a life estate in all the property, real and personal. Wilbur F. Boyle, executor, appears to have treated the estate as if his mother had a life interest in all the property; the case was tried on that theory, so it is unnecessary to set out the will.

Emeline G. Boyle died June 11, 1907; Wilbur F. Boyle died in March, 1911; this suit was filed on the tenth day of June, 1912, five years, lacking one day, from the death of Emeline G. Boyle.

It is claimed by the plaintiff that Wilbur F. Boyle was the trustee of an express trust, having charge of all the interest and estate of his mother in Joseph Boyle's property. This is disputed by defendant, but for the purpose of this case it may be conceded that he was such trustee, and acknowledged himself as such in writing by executing in 1877 what is claimed to be a declaration of trust. The case may be treated then as one in which Emeline G. Boyle, the plaintiff's intestate, had a life interest in all the property, real and personal, left by Joseph Boyle, deceased, at his death in 1872. Wilbur F. Boyle took charge of and managed the property as trustee, and was accountable to the *cestui que trust* for the income arising from the property during the life of his mother, the trust terminating on her death in 1907.

The inventory of Joseph Boyle's estate filed by the executor showed personal property, consisting mainly of notes, amounting to \$6,103.02, and seven pieces of real estate. This inventory of the estate was filed September 18, 1872. The executor thereafter filed four annual settlements in the Probate Court of St. Louis, the first in September, 1873; the second in July, 1874; the third in June, 1875; the fourth in June, 1876; and a final settlement sworn to December 31, 1877, was filed January 15, 1878, about eighteen months after the fourth annual settlement. These annual settlements show the amounts of rents and interest received by the executor, and the amounts paid to the widow during the period of administration up to the fourth annual settlement. At the first annual settlement the executor took credit for \$2220.60 paid to the widow Emeline G. Boyle on the second annual settlement he took credit for \$1206.40; in the third, for \$1351.30 and in the fourth for \$1786.10. In the final settlement, executed December 31, 1877, there is this entry: "By amount paid Mrs. F. G. Boyle who is, under the will of deceased, entitled to the estate during life, \$4241.10." That credit, after accounting for all other receipts and disbursements, balances the estate, showing no property in the executor's hands. December 26, 1877, three days be-

fore he swore to his final settlement, he executed the following document:

"This memorandum witnesseth, that whereas I have this day received from Mrs. E. G. Boyle her receipt to be filed with my final settlement of the estate of Joseph Boyle, deceased, for the sum of \$4,241.10, yet as a matter of fact *I have not paid this amount of money to her*, and have obtained her receipt simply for the purpose of closing up the administration in the probate court. This amount, together with the other assets of the estate of Joseph Boyle, are held by me as trustee or agent with the consent of Mrs. E. G. Boyle and of my sister, Mrs. Virginia Price, and I am to pay the income from the property to Mrs. E. G. Boyle during her life, and upon her death to divide the remainder between my said sister and myself as directed by the will of Joseph Boyle, deceased. I have this day rendered to Mrs. E. G. Boyle and Mrs. Virginia Price *a statement setting forth in full all of the assets of the estate, including the above amount which appears in the probate court*, all of which assets are in my hands for the purposes above mentioned.

WILBUR F. BOYLE.

"St. Louis, December 26, 1877."

We have italicized some parts of the document which seem significant. He had sold all the real estate except three pieces, and had on hand, not shown in the final settlement, as the proceeds of such sale, \$9,706 in cash, notes representing deferred payments from the sale of real estate \$2,200, and one share of Biddle Market stock \$25. The plaintiff adds to these amounts the \$4241.10 mentioned, marking a total of \$16,172.10, and seeks to charge the estate of Wilbur F. Boyle with that amount, and interest on it from the time of final settlement in 1877 to the time suit was filed in 1912. Of the three pieces of real estate remaining in the hands of the executor, two were sold and conveyed together, June 1, 1895, for a recited consideration of \$3,500. The other piece of real estate was sold in 1897, and conveyed for a recited consideration of \$17,000. The plaintiff takes these two

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sums, \$3500 and \$17,000, recited in the deeds charges the amount to the trustee, Wilbur F. Boyle, with interest on same from the dates of the deed until the filing of the suit.

No books or accounts were discovered satisfactorily showing the moneys received and disbursed by Wilbur F. Boyle while he was acting in the alleged capacity of trustee, but he presented to his mother from time to time statements of his accounts, as trustee, some of which were introduced in evidence. The plaintiff, administrator, is the son of Virginia Price, and she would be the principal beneficiary in any proceeds resulting from this suit. Her mother lived with her for many years prior to her death, though perhaps not continuously. Mrs. Price had possession of all the papers her mother possessed relating to the estate. She testified that she destroyed most of those papers, and what were rescued from the destruction were turned over to Mr. Laurie for examination after Wilbur F. Boyle's death. She did not know what sort of papers were destroyed, nor what papers she turned over to Mr. Laurie. She claimed to be extremely ignorant of business matters in general and knew nothing about the business transactions connected with the estate; she trusted everything to her brother, and never suspected that anything was wrong with the estate until after her brother's death in 1919. She admitted she was disappointed by the provisions of his will, and on account of that disappointment started some investigations which aroused her suspicions and caused her to have an administrator of her mother's estate appointed, and this suit to be brought.

Among the papers rescued in the general destruction was a statement of moneys belonging to Joseph Boyle's estate received and expended by W. F. Boyle from May, 1872, to July 2, 1875; also a statement covering the period from May 12, to December 26, 1877; also one for the period from December 31, 1877, to July 1, 1879; one for the years 1880, 1881 and 1882, and one for the years 1883 to 1890, inclusive. No statements

were rescued showing what was received and expended between the periods mentioned, or what was received or disbursed after 1890. What was received and disbursed during these periods is largely conjectural.

The plaintiff proceeds to charge the estate of Wilbur F. Boyle with the amounts above mentioned as in his hands at the final settlement of his father's estate, with the amounts acknowledged by him in those statements handed his mother, to have been received, with the recited considerations in the two deeds mentioned, and gives him credit for no payments or expenses during all the time except those proven, and by dint of figuring brings out the estate of Boyle indebted to the plaintiff's intestate in an amount exceeding fifty thousand dollars.

The defendant employed an expert accountant to go over the matter, and this expert, by making certain estimates and by taking into account entries in the diary of Wilbur F. Boyle, which was found among his papers and the stubs of his check books, reached the conclusion that the estate was indebted to him at the time of his mother's death in an amount of nearly eight thousand dollars; that is, he had overpaid his mother that amount. It is likely that some of the figures fixed by the accountant were not proper charges against the beneficiary, and for some estimates he had no certain basis. All of which shows the difficulty of ascertaining the true state of the account at the time of the trial, after the two parties who knew most about it, Wilbur F. Boyle and his mother, were dead.

I. At the death of Emeline G. Boyle in June, 1907, the so-called trust terminated and the administrator of her estate, if he had been appointed at that time, could have demanded of Wilbur F. Boyle that he account in all particulars and show in what manner he had executed his trust; but in order to maintain a suit it would have to be shown that he had not accounted to his mother in her

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lifetime, for all her property in his hands. The proceeding at that time would have saved the embarrassment caused by Wilbur F. Boyle's death. During the four years which elapsed between his mother's death and his own, he was in position to account strictly for everything that took place in the management of the trust property. After his death, however, the only evidence which would show whether or not he had accounted, and, if not, in what manner he had discharged his trust, were papers and records left, many of which possibly were destroyed by Mrs. Price.

The plaintiff assumes that in the absence of proof the defendant should not be credited with any payments, notwithstanding the unsatisfactory condition of the evidence and the manifest lack of evidence which once existed. He starts out with charging defendant's testator with an account, as follows:

"Personal estate as shown by final settlement and declaration of trust	\$4241.10
"Proceeds of real estate actually collected	9706.00
"Proceeds of real estate, deferred payment, represented by two notes	2200.00
"One share of Biddle Market stock	25.00

"Total \$16,172.10"

He also assumes that Boyle's final settlement is *conclusive* against him. If it is conclusive he should have credit for \$4241.10, for which he filed his mother's receipt. The plaintiff, however, discards his own assumption and resorts to other evidence to show that he did not pay her that money. He resorts to the so-called declaration of trust, above set out, in which Wilbur F. Boyle stated he did not pay her "that amount of money," but that he held it as "trustee or agent." That same paper says further that Boyle has "*this day rendered to Mrs. E. G. Boyle and Mrs. Virginia Price a statement setting forth in full all the assets of the estate, including the amount which appears in the probate court.*" That statement, submitted with the dec-

laration of trust, is of equal value as evidence. It shows the amount due the estate was \$14,656, which is over \$1500 less than plaintiff charges him with. Plaintiff, however, in looking for evidence to overthrow the final settlement, ignores the very evidence which shows the trustee had in fact paid his mother a large part of that \$4241.10, for which she gave her receipt. In the final settlement made in December, 1877, he did not take credit for any money paid his mother after the fourth annual settlement, filed eighteen months before, unless it was included in that sum. Yet, during each previous year he had paid her a large sum as shown by his annual settlements, as follows:

At first annual settlement filed September 23, 1873	\$ 2220.60
At second annual settlement filed July 15, 1874	1206.40
At third annual settlement filed June 28, 1875	1351.30
At fourth annual settlement filed June 30, 1876	\$1786.10
Total	\$ 6564.40
An average per year of	\$ 1391.10

It is absolutely unreasonable to conclude that after paying his mother, yearly, sums like that up to the fourth annual settlement, he then absolutely ceased to pay her anything whatever for over eighteen months until the final settlement. If resort must be had to evidence outside the probate record to impeach the final settlement, reason and common sense must be allowed their common functions. That the executor should have paid his mother nothing to live on during eighteen months is not only contrary to reason, but in the statement which he handed her at the time he gave her the "declaration of trust," December 26, 1877, he shows that he had paid her sums of money every month from May 14, 1877, to December 26, 1877, amounting altogether to \$762.50 for the last six months of the period. The plaintiff, however, chooses to ig-

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nore that part of the statement as modifying the amount which he seeks to charge. It is to be noted that, in the statements rendered by Wilbur F. Boyle to his mother, that particular period from the fourth annual settlement in June, 1876, to May, 1877, was not covered by the papers rescued from destruction. The account during that period, if it had been recovered, together with the payments listed in the last half of the year 1877, probably would show exactly how much of the \$4241.10 had been actually paid at that time and how much was remaining in his hands. Since the statement showed that he had paid out \$762 during the last half of the year 1877, it is likely that he paid a proportional amount during the year preceding. The interpretation of the "declaration of trust" to mean that Boyle had all the \$4241.10, cannot be correct because modified by the statement submitted with it. The statements which Wilbur F. Boyle rendered his mother were in her possession all the time until her death and afterwards in the possession of Mrs. Price until she saw fit to destroy papers which probably included portions of them.

Thus the plaintiff, beginning without sufficient evidence by charging the defendant with a sum largely in excess of what Wilbur F. Boyle had in his hands at that date, charges him with compound interest on it for thirty years.

There is another particular in which the plaintiff assumes a gross sum of money in Wilbur F. Boyle's hands; when in 1897 he conveyed the last tract of land for a recited consideration of \$17,000. It is true the recited consideration in the deed is prima-facie evidence of the real consideration, and holds until the contrary is shown. That was the old home place of Joseph Boyle, it seems. In 1875 it rented for \$86 a month, and continued to rent at that rate for some time thereafter, but it began to deteriorate in value because of conditions in the neighborhood. It got to be a disreputable neighborhood so that it could scarcely be rented. The rents, as stated by Wilbur F. Boyle, prior to 1890

showed a steady decline. The total rents in 1888 were something over \$700; in 1889, something over \$250; in 1890, the first six months, about \$120. Mrs. Price in her testimony said that it couldn't be rented to good people, and her mother would not allow it to be rented to people who would pay a good price; the neighborhood had become very bad. It must have been, then, that the property depreciated in selling value along with the rental value. No one would pay a large price for it, either to live in or to rent. The rental of about a thousand dollars a year, paid during the early years of the trust, would probably indicate a value of \$17,000; possibly the property might have been sold at that time for that price. At the time it was sold in 1897, if rents had continued to decline, it probably did not rent for enough to pay the taxes. It is highly improbable that it was worth anything like the amount recited in the deed. There is some evidence to indicate that the property was traded for other real estate. What became of the other real estate is not shown. It is a well known fact that, in trading real estate, often it is not cash values which are mentioned as the consideration in the deed. So there is some evidence to indicate that the consideration recited in the deed is not a correct one.

A trustee in charge of property must account to his *cestui que trust*, and Wilbur F. Boyle was accountable on the termination of the trust at the death of his mother. But it must be shown that he had not accounted at that time.

Taking all these things into consideration on the state of the evidence here, we might say it is such as to give rise to great doubt whether the plaintiff has made out a prima-facie case on the facts, a matter that might be considered more fully and would require a completer analysis of the evidence, but for the point to be noted in the next paragraph.

II. This suit was brought four years and three hundred and sixty-four days after the termination of

the trust. Laches is urged as a defense. Where a party rests upon his rights, and fails to bring suit when he might have done so, for a time short of the period of limitations, in a proceeding in equity, the courts sometimes deny relief on the ground of an unreasonable delay, where circumstances intervene to work hardship upon the defendant in making his defense. Where, by reason of delay, evidence becomes unavailable, or important witnesses have died and it becomes impossible to ascertain the facts, laches will bar recovery. [Casebolt v. Courtney, 195 S. W. 746, and cases cited.]

In the present case there was no suspicion at any time during the life of Wilbur F. Boyle that he was not faithfully discharging his duties as trustee; that he did faithfully discharge them during the five years' administration is not now in dispute. Not only was there no complaint during the subsequent years, but letters were introduced in evidence breathing the greatest confidence in him on the part of his sister and his mother. There was no intimation anywhere that his mother during her life was not entirely satisfied with his management of the estate. After his death no witness who knew the facts remained alive. All that remained were the public records and such statements as he had rendered to his mother. That he rendered such statements in detail during several years of his trust indicates that other statements were rendered covering the rest of the time, which in all probability were destroyed at the time Mrs. Price committed to destruction the papers in her possession—the best evidence then available to show whether or not Boyle had accounted for his trust. The strong probability, almost certainty, that he paid his mother large sums of money between the fourth annual settlement and the final settlement, for which the plaintiff gives no credit, indicates that at other intervals between his statements as preserved, he made similar accounting. The trustee, had he been alive, could have explained all that.

The recital in the last deed for \$17,000, is prima-facie correct, and the only person who certainly knew whether it was correct or not was Wilbur F. Boyle himself. The fact that he was dead rendered that evidence unavailable. There were several circumstances indicating that such was not the consideration paid in cash.

All these circumstances, which place upon the defendant the burden of making proof after the plaintiff has waited until that burden cannot be sustained, because the proof is destroyed, furnish reasons for applying the doctrine of laches. It is true Mrs. Price testified she had no reason to suspect anything wrong until after her brother's death when, on account of dissatisfaction with his will, an investigation of his papers led to discoveries. The discoveries, however, are shown in the fragmentary papers which she neglected to destroy. These, as we have seen, do not warrant the conclusion which plaintiff has drawn from them, and we are not at liberty to say that these alleged discoveries would warrant Mrs. Price in assuming a different state of mind in regard to the matter from that she maintained during the life of her brother.

The respondent urges as a reason why laches should not be imputed to him and his intestate, that Emeline G. Boyle placed the utmost confidence in her son, was ignorant of business, and did not know or suspect that his accounts were incorrect or irregular in any manner. At the time of the final settlement which occurred thirty years before her death, she must have been in full possession of all her faculties; something over sixty years of age—the time of life when a woman's knowledge of business and property affairs is often at its best. She had received from her son, trustee, the income from the estate amounting on an average to nearly fourteen hundred dollars a year, for four years, then suddenly she received nothing for a period of eighteen months from the fourth annual settlement until the final settlement; on respondent's theory, a trifling neglect of that sort escaped her notice. She lived that eighteen months

without anything to live on without being aware that she was living on nothing, and for thirty years it was never brought to her attention. It remained for her administrator, thirty-five years afterwards, to dig up evidence of her destitution during that period, from the remnant and shreds of papers, most of which had been destroyed.

The judgment is reversed and the cause is remanded with directions to the trial court to set aside the order granting a new trial on the second count, and to reinstate the judgment as originally entered. *Mozley, C.*, concurs; *Railey, C.*, not sitting.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

GERMO MANUFACTURING COMPANY, Appellant,
v. ROBERT C. COMBS et al.

Division Two, April 7, 1921.

APPELLATE JURISDICTION: Amount in Dispute: Demand. In a suit in equity to restrain defendants from transgressing upon plaintiff's property rights, in which it is alleged that defendants have "damaged the plaintiff in a sum in excess of \$10,000" and praying that the court "award the plaintiff such damages as it has sustained in the sum of \$7,500," the plaintiff's appeal, upon a finding in the trial court for defendants, is to the Court of Appeals. Plaintiff, under the prayer, could in no case recover in excess of \$7,500, and that is the amount in dispute upon its appeal.

Appeal from Jackson Circuit Court.—*Hon. Willard P. Hall*, Judge.

TRANSFERRED TO KANSAS CITY COURT OF APPEALS.

Bruce Barnett, G. W. Barnett and J. H. Rodes for appellant; *Henry Lamm* of counsel.

Ingraham, Guthrie & Durham for respondents.

WALKER, J.—This is a suit in equity to enjoin defendants from using an alleged secret formula used by plaintiff in the compounding of a poultry remedy. The trial judge, after a review of all of the testimony, found in favor of the defendants. Plaintiff appealed to the Kansas City Court of Appeals, which, on its own motion, transferred the case to this court on the ground that the amount in dispute exceeded the jurisdiction of that court. That question confronts us at the threshold of the case.

After numerous specific allegations of unfair competition, the petition states:

“That the defendants have wrongfully taken from the plaintiff and appropriated to their own use many customers and prospective customers of plaintiff, and the profit on a large business that it has built up, and has materially damaged the plaintiff in a sum in excess of \$10,000; that defendants are now engaged in said unlawful competition, and propose to continue the same to the further great loss and damage to this plaintiff.

“Plaintiff says that on account of the continuing nature of defendants’ wrongful acts and the inability of the plaintiff to determine fully the amount or extent of its damages, and the fact that it is a constantly continuing and recurring injury, which renders it impossible to definitely estimate the extent and nature of plaintiff’s injury and damage, and because plaintiff has no adequate remedy at law, it appeals to the equitable interposition of this court for injunctive relief. That if defendants are not restrained and enjoined from their unlawful competition, plaintiff will continue to suffer and sustain great and irreparable loss and injury from which no adequate remedy is given at law.”

After other general allegations of injury, not pertinent here, the petition closes with the following prayer:

"That the court, upon restraining and enjoining defendants, may take an account as to the extent of plaintiff's damages, and award the plaintiff such damages that it has sustained, by reason of such unfair competition, in the sum of seven thousand five hundred dollars; and that the plaintiff may have and recover from the defendants the costs in its behalf laid out and expended."

General averments as to the extent of plaintiff's damages as disclosed in the foregoing excerpts from the petition are only rendered definitive by the prayer, which fixes the maximum amount claimed at \$7,500. Under no circumstances could the plaintiff recover a greater amount. Cases, therefore, are not applicable which hold that in ascertaining the appellate jurisdiction of the Supreme Court we are not restricted to the amount claimed in the petition, but may look into the entire record and from that determine the amount in dispute or the monetary value of the right claimed to have been lost. Cases illustrative of the application of that rule are numerous. It is significant, in distinguishing them from the case at bar, that in none of them was it attempted in looking into the record to ascertain if the plaintiff was entitled to a larger amount of damages than claimed in his petition, but to ascertain if there were substantial grounds upon which a right of recovery of the claim as made could be based. To illustrate: In *Ferguson v. Comfort*, 264 Mo. 274, property of the value of \$6,000 and damages in the sum of \$5,000 were claimed. The record disclosed an abandonment of the claim of \$5000 and hence it was held that there was no jurisdiction in the Supreme Court. In *State ex rel. Electric L. & P. Co. v. Reynolds*, 256 Mo. 710, the amount in dispute upon which the jurisdiction depended was not definitely stated in the petition, but the proceeding being one to oust a corporation of its franchise which had a capital stock of an amount and a going business of a value far

in excess of the maximum limit of the jurisdiction of the Court of Appeals, it was held that the case should be determined in the Supreme Court. In *Wilson v. Drainage District*, 237 Mo. 39, the amount claimed in the prayer of the petition, with interest, was found, upon an inspection of the record, to be less than the maximum amount of the pecuniary jurisdiction of the Court of Appeals and the case was transferred to that court for final determination. In *McCoy v. Randall*, 222 Mo. 24, special tax-bills belonging to the same person were sought by plaintiff to be declared void by injunction. An inspection of the record disclosed that their aggregate amount exceeded the sum of \$4,500, the then maximum jurisdictional limit of the Court of Appeals' right of review. In *Vanderberg v. Gas Co.*, 199 Mo. 455, the plaintiff laid her claim at \$5,000 actual and \$5,000 punitive damages. Looking into the record, the court found that "there was not a shadow of evidence for the claim of punitive damages." This left only the claim of \$5,000 for actual damages, and as a consequence the case was transferred to the Court of Appeals. Numerous earlier rulings of this court are cited in this case, page 460. In *Clothing Co. v. Watson*, 168 Mo. 143, a proceeding for an injunction, plaintiff alleged that if the defendants be not restrained plaintiff would be damaged in excess of \$10,000. This was held sufficient to show jurisdiction in this court. "The test," said the court, "is the value in money of the relief afforded plaintiff should the relief prayed for be granted, or, *vice versa*, should the relief be denied." [Citing *Fire Brick Co. v. St. Louis Smelting Co.*, 48 Mo. App. 634; *Gast Co. v. Assn.*, 147 Mo. 557.] The differentiation of these cases from those in which the plaintiff has made an unequivocal demand for damages in a certain sum but conforms to the statute (Sec. 1699, R. S. 1919) which provides that "in all actions not founded on contract the damages claimed in the petition shall determine the jurisdiction of the court."

This statute has received our approval in *Kane v. Kane's Admr.*, 146 Mo. 605, in which we held that the

amount claimed in the petition is the amount involved where the judgment, as at bar, was for the defendant; and in *Hennessey v. Bavarian Br. Co.*, 145 Mo. l. c. 116, in which we held, citing with approval *Vineyard v. Lynch*, 86 Mo. 684, that the only safe rule is to regard the amount claimed in the petition as the amount in dispute until the claim has been reduced to a judgment.

The application of a test other than that which makes the definite amount claimed by the plaintiff the measure of jurisdiction would create the anomalous condition of conferring upon the appellate court the right of review but limit its judgment, as it would, of necessity, have to be limited, in recognition of the regularity of the proceedings and to preserve the integrity of the judgment, to the amount claimed by the plaintiff. [*Smith v. Royse*, 165 Mo. 654; *State ex rel. Snyder v. Davidson*, 87 Mo. 683; *Moore v. Dixon*, 50 Mo. 424; *Moore v. Railroad*, 117 Mo. App. 384; *Payne v. King*, 141 Mo. App. 246.] In short, the plaintiff who designates, as at bar, a certain sum as comprehending the whole amount of his damages cannot recover anything in excess thereof. It is elementary that the sum thus designated constitutes the amount in dispute and to disregard it in the rendition of the judgment would not answer the purpose of the proceeding or settle the matter at issue. Certainly the fact cannot be gainsaid that the petition is as much a part of the record as the judgment, and if the judgment be not authorized by the allegations of the petition is it erroneous. [*St. Louis v. Wright Const. Co.*, 210 Mo. 499.]

Plaintiff's general allegations as in excess of \$10,000 and its inability to definitely estimate same, may, in the absence of a prayer for general relief be interpreted as reasons in support of its plea for equitable intervention. Especially is this true where a specific sum is subsequently claimed as the total of plaintiff's demand. Such total being within the monetary jurisdiction of the Court of Appeals, and no other jurisdictional question being present, the case should be transferred to that court for final determination. It is so ordered. All concur.

MARTHA J. LITTLE et al., Appellants, v. VIDA C. BROWNING et al.

Division One. April 9, 1921.

1. **PROCESS: Idem Sonans.** A defendant named Hornbeck was served with a summons under the name of Hornback. *Held*, that the service and a judgment founded on it were valid, the two names being *idem sonans*.
2. **INFANCY: No Guardian: Judgment.** Service of summons upon an infant defendant gives the court jurisdiction to proceed, and if it does proceed to judgment without appointing a guardian *ad litem* and there is no general guardian, the judgment, while erroneous, will not be subject to collateral attack.
3. **JUDGMENT: Appearance of Attorney: Infant.** In a suit against several defendants, one of them, an infant, was not served with process, but an attorney appeared and obtained leave of the court to file answer for all the defendants within ninety days. After the lapse of this time an entry of record was made setting forth the names of all the parties, reciting that the defendants had appeared at the last term of court and taken leave to file answer, but had said nothing further in bar of plaintiffs' action, and thereupon judgment followed. *Held*, that as to the infant defendant the judgment was void, *first*, because the leave to answer had been granted *ex mero motu* and constituted no evidence of an appearance by an unserved defendant; *second*, because of the infancy of this defendant.

Appeal from Linn Circuit Court.—*Hon. Fred Lamb*, Judge.

REVERSED AND REMANDED.

Willard P. Cave for appellants.

The judgment was absolutely void as to Alice Hornbeck-Reynolds. She was only fifteen years old. *McMurry v. Fairley*, 194 Mo. 502. Lack of service made the judgment open to collateral attack. *McClanahan v. West*, 100 Mo. 309; *Winningham v. Trueblood*, 149 Mo. 572.

H. J. West and E. B. Fields for respondent.

(1) The judgment as to Martha J. Little is valid and binding, but if not it is only voidable and cannot be attacked in this collateral proceeding. *Chrisman v. Divinia*, 141 Mo. 122; *Charley v. Kelley*, 120 Mo. 134; *Cochran v. Thomas*, 131 Mo. 258; *Townsend v. Cox*, 45 Mo. 401; *Fulbright v. Cannefox*, 30 Mo. 425; *Bailey v. McGinniss*, 57 Mo. 362; *Weiss v. Coudrey*, 102 Mo. App. 69; *Shaffer v. Detie*, 191 Mo. 388; *Baker v. Kennett*, 54 Mo. 88. (2) And a judgment against an infant is valid until set aside in same direct proceeding. *Smith v. Perkins*, 124 Mo. 50. (3) The service on Alice J. Hornbeck (now Little, although by misspelled name, being personal was good. *Roberts v. Stone*, 99 Mo. App. 431; *Turner v. Gregory*, 151 Mo. 103; *Corrigan v. Schmidt*, 126 Mo. 311. (4) The judgment as to Alice Hornbeck was not void but voidable, she and all defendants having as shown by the record appeared by attorney and asked for time to file answer. *Christman v. Divinia*, 141 Mo. 122; *Cochran v. Thomas*, 131 Mo. 258; *Townsend v. Cox*, 45 Mo. 401; *Bailey v. McGinniss*, 57 Mo. 362; *Fulbright v. Cannefox*, 30 Mo. 425; *Charley v. Kelley*, 120 Mo. 134; *Weiss v. Coudrey*, 102 Mo. App. 69; *Shaffer v. Detie*, 191 Mo. 388; *Baker v. Kennett*, 54 Mo. 88.

JAMES T. BLAIR, J.—The petition is drawn under Section 1970, Revised Statutes 1919. The purpose of the proceeding is to quiet title to land in Linn County. No equities are set up in either the petition or answer. The case was tried to the court sitting as a jury. No declarations of law were asked or given.

It is stipulated that Eliza J. Hornbeck is the common source of title. She acquired the land in 1874. In 1880 she died intestate. She was survived by her husband, Isaac, and by six children, the plaintiffs Martha J. Little and Alice H. Reynolds and defendants John Hornbeck, Frank Hornbeck, Mary Young Zimmerman and Elizabeth Sherwood. In 1882 Mary J. Malloy bought the interest

of Frank Hornbeck at sheriff's sale. May 5, 1883, Mary J. Malloy and her husband, P. B. Malloy, commenced suit in the Linn Circuit Court to partition the remainder subject to the curtesy of Isaac J. Hornbeck. The latter and the five children, other than Frank, were named as defendants. On May 12, 1883, summons was issued to the sheriff of Livingston County for Mary A. Young and Nathaniel Young, her husband, and for Martha J. Hornback. The return, under date of May 14, 1883, shows service on Nathaniel Young, Mary A. Young and Martha J. Hornback. Summons was issued May 12, 1883, to the sheriff of Linn County for Isaac Hornback, and a return appears thereon, under date of May 18, 1883. At the June term, 1883, the Circuit Court of Linn County entered an order giving leave to answer. The decree was entered on December 15, 1883. It recites: "Now come plaintiffs by attorney, and the defendants having appeared at the last term of court and taken leave to file answer herein, say nothing further in bar of plaintiff's action." The court then entered its decree to the effect that plaintiff Mary J. Malloy and the five defendant children of Elizabeth Hornbeck owned the remainder in the land subject to the life estate of Isaac Hornbeck, and ordered the remainder interest sold and the proceeds distributed in accordance with its finding as to the title. The sale was made in due time and reported and the money paid into court. The sheriff's deed to Mary J. Malloy, H. K. West and A. W. Mullins was acknowledged in open court June 30, 1884. The same persons, in August, 1884, bought the interest of Isaac Hornbeck at sheriff's sale. West and Mullins acquired Mrs. Malloy's interest, and in 1887 conveyed by warranty deed to Craig, whose title respondent Vida C. Browning now has, through mesne conveyances.

There was evidence that Mrs. Malloy, West and Mullins, upon their purchase, went into immediate possession; that they and their grantees have been in "the open, notorious, adverse and exclusive possession of the land ever since, claiming to own the same, paying taxes and making valuable improvements thereon." There was conflict-

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ing testimony concerning the ages which appellants had attained in 1883. There is substantial evidence that Martha J. was born November 12, 1865, and that Alice was born in June, 1867. This is the evidence relied upon by respondents. In the circumstances, it will be assumed in support of the judgment that the trial court so found the facts.

I. Respondents concede the life estate of Isaac Hornbeck, which fell in in 1907, prevented the Statute of Limitations from beginning to run time to bar this action, which was begun in 1916. [Reed v. Lowe, 163 Mo. l. c. 535.]

II. It is contended the court had no jurisdiction of appellants in the partition suit.

(1) (a) There was service upon Mrs. Little. While the summons and return give her name as Martha J. Hornback, though her name was then Hornbeck, she was called upon to take cognizance of it. The judgment is not void because her name was misspelled. [Turner v. Gregory, 151 Mo. l. c. 103; Corrigan v. Schmidt, 126 Mo. l. c. 311; Martin v. Barron, 37 Mo. 301.] The names Hornbeck and Hornback are *idem sonans*. This rule applies if the attentive ear finds difficulty in distinguishing the names when pronounced. [Simonson v. Dolan, 114 Mo. l. c. 179; Heberling v. Moudy, 247 Mo. l. c. 541.] The accent is upon the first syllable of both Hornbeck and Hornback and the resultant remission, lack or weakening of stress upon the final syllable in each name modifies the sound of both the a and e in those syllables toward a neutral sound. This is formulated into a rule of pronunciation by lexicographers which is derived from common practice and common knowledge. The similarity in sound between a and e, even in accented syllables, has been held sufficient to justify holding names *idem sonans*. [Bergman's Appeal, 88 Pa. St. l. c. 123; State v. Bean, 19 Vt. 532.]

(b) Martha J. was not of age when the partition suit was begun. She had no general guardian and no

guardian *ad litem* was appointed for her. Nevertheless, even if it could be conceded she remained a minor until judgment was rendered, the service upon her gave the court jurisdiction to proceed; and the omission to appoint a guardian *ad litem*, while erroneous, does not subject the judgment to collateral attack. [Charley v. Kelley, 120 Mo. l. c. 143, 144, and cases cited; Reineman v. Larkin, 222 Mo. l. c. 171, 172; Townsend v. Cox, 45 Mo. l. c. 403, 404; Bailey & Woods v. McGinnis, 57 Mo. l. c. 373, 374; Cochran v. Thomas, 131 Mo. l. c. 275, 276.]

(2) The judgment roll, files and records in the partition suit were put in evidence. The abstract shows that everything in that case was offered in this. It is stated, in effect, that the offerings included the summonses issued, the service upon defendants and the entire record in the case. The judgment in that case does not recite that service was had but, on its face, proceeds upon a recital that defendants had previously appeared. It shows Mrs. Reynolds did not appear at the trial. There was no summons issued for Mrs. Reynolds (then Hornbeck) and no service was had upon her. Three other defendants had been served. An effort at service upon a fourth had been made. Respondents contend appellant Alice appeared June 8, 1883, by her attorney, and took leave to file answer and thereby waived objections to lack of service. The record in the partition suit shows that on June 8, 1883, the following entry was made: "P. B. Malloy et al. v. Isaac Hornbeck et al. Now come the defendants by attorney and move the court to file answer in ninety days, which is granted and the cause continued." The judgment was entered under a caption giving the names of plaintiffs and of all of the defendants. It recited: "Now come the plaintiffs by attorney, and the defendants having appeared at the last term of the court and taken leave to file answer herein," etc. Respondents' position is that these entries show such an appearance by Alice Hornbeck as to render the judg-

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ment invulnerable to collateral attack. The question is not new in this court. In *Bell v. Brinkman*, 123 Mo. 270, this Court in Banc, had before it a record in which the party defending the former judgment was in a position resembling that of respondents here. In that case it appeared that some defendants had been served and some had not, that leave had been granted to answer, and that the assailed judgment, under a caption which named all the parties, recited that "At this day come the said parties, by their respective attorneys," etc. This court held the leave to answer in question had been granted by the court *ex mero motu* and constituted no evidence of an appearance by unserved defendants; and that the recital in the judgment as to the appearance of defendant must be confined to "such of the parties as it appears from the roll the court had acquired jurisdiction over, the parties plaintiff who have brought the suit, and the parties defendant who had been brought into court by process." There were ten defendants in that case. Two had been served. The rule is equally applicable to the order with respect to leave to answer in the partition suit involved in this case. The judgment recital refers to and is based upon that order. In *Mullins v. Rieger*, 169 Mo. 521, this Division reached similar conclusion in a similar case, and that decision was followed in *Barron v. Cooperage Co.*, 185 Mo. App. l. c. 634, 635. The rule of these cases is said in 2 Ency. of Pl. & Pr. p. 600, to be supported by "the better considered cases and the probable weight of authority." The decisions bear this out. [*Foster v. Hall*, 2 J. J. Marsh, 546; *Violet v. Waters*, 1 J. J. Marsh, 303; *Crump v. Bennett*, 2 Litt. l. c. 214; *Moores v. Parker*, 3 Litt. l. c. 268; *Phelps v. Brewer*, 9 Cush. 390; *Hubbard v. Du-bois*, 37 Vt. l. c. 97; *Edwards v. Toomer*, 14 Smed. & M. l. c. 80; *Dawson v. Bridges*, 19 Ill. App. 280; *Correll v. Greider*, 245 Ill. 378; *McCall v. Leshner*, 7 Ill. l. c. 48, 49; *Gardner v. Hall*, 29 Ill. 277; *Barker v. Shepard*, 42 Miss. 277; *Kite v. Bonafield*, 3 G. Greene, l. c. 199, 200; *Rhoades v. Delaney*, 50 Ind. l. c. 470, 471; *Anderson v. Sloan*, 1

Colo. l. c. 488; Gargan v. School Dist., 4 Colo. l. c. 57; Chester v. Miller, 13 Cal. l. c. 561; Davis v. Whittaker, 38 Ark. l. c. 438; Snow v. Grace, 25 Ark. l. c. 572; Bank v. Bank, 171 Ind. l. c. 332; Dougherty v. Shown, 1 Heisk. 302.] Rulings that a pleading or motion filed or made for "defendants," when there are but two and but one of these is served, constitutes an appearance for all (McCreary v. Jones, 96 Ala. l. c. 594; Frazier v. Resor, 23 Ill. l. c. 89; Solomon v. Tupelo Compress, 70 Miss. 822; Abbott v. Semple, 25 Ill. 107), decide a different question in that they seem to be based upon the view that the word "defendants" will be construed to include both defendants in order to explain the use of the plural number.

For a like reason a case in which only one of several defendants has been served and an appearance is made for "the defendants," such as Beal v. Harrington, 116 Ill. l. c. 119, 120, is distinguishable. In Kerr v. Swallow, 33 Ill. l. c. 380, the same rule was applied to defendants, none of whom had been served.

A rule contrary to that in Bell v. Brinkman, *supra*, and like cases was applied in Ely v. Tallman, 14 Wis. 28; Kenyon v. Shreck, 52 Ill. l. c. 384; Hunt's Heirs v. Ellison's Heir, 32 Ala. l. c. 181; *et seq.*; Cole v. Johnson, 53 Miss. l. c. 97; Seedhouse v. Broward, 34 Fla. l. c. 520; Sullivan v. Sullivan, 42 Ill. 315.

In no case, however, do we find it held that a person *non sui juris*, who has not been served, is brought in by such recitals as were held good as to persons *sui juris* in the cases last cited. In fact, it is indicated (Hunt's Heirs v. Ellison's Heirs, *supra*) that the rule is applicable only to persons *sui juris*. Alice Hornbeck was a minor. Her capacity to act for herself was limited. We are of opinion she is not shown to have appeared.

III. This disposes of the questions raised by counsel. It results that the judgment is affirmed as to Martha J. Little, and is reversed and the cause remanded as to Alice Reynolds. All concur.

ARNOLD STAPENHORST et al., Appellants, v. CITY
OF ST. LOUIS.

Division One, April 9, 1921.

1. **DAMAGES: Grade of Street: Waiver: Estoppel.** Where there was embodied in the deed of dedication of a sub-division a clause to the effect that "all avenues and alleys laid out in said sub-division, and for better identification etched on the above plat, are hereby dedicated to public use forever, and any claims for damages which may arise by reason of changing the present surface of said avenues and alleys to conform to such grades as may hereafter be established by the city, are hereby waived," and said deed of dedication was accepted by the city and duly recorded, and thereafter the grade of one of said avenues was changed to seven feet below the natural surface, after plaintiffs, with notice, bought lands abutting thereon from the dedicator, they are estopped to claim damages contrary to said waiver
2. ———: ———: ———: **Consideration: Acceptance.** The acceptance by the city of a deed dedicating streets to public use and containing a waiver of damages for changes in the grade is in itself a sufficient consideration to sustain both the dedication and waiver.
3. ———: ———: ———: **Damages to Abutting Property.** The Constitution of 1875, in declaring that private property cannot be taken or damaged for public use without just compensation, did not prevent a proprietor of a sub-division of land, who wishes to subdivide it into blocks, streets, lots and alleys, from expressly authorizing the city, in the deed of dedication, to grade the streets without paying damages to abutting property. By his deed of dedication, the proprietor may give up his right to compensation, for the uses included in the dedication, both for the taking of the property used as the street and for damages to the adjoining property resulting from such use.
4. ———: ———: ———: **Running With Title: Easement.** Where the owner of land by his deed of dedication gives and dedicates to the public an easement to use and grade the land embraced in the street without the payment of damages to the dedicator's adjoining land, and such deed is accepted by the city and is acknowledged and recorded, subsequent purchasers from such owner of lots abutting on the street take title subject and servient to

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such public easement, which becomes an encumbrance upon their lots and runs with the title. The city's right to grade without paying damages, in such case, is an easement, and not a mere revokable license.

5. ———: ———: ———: **Coerced by City: Evidence.** That the board of public improvements refused to approve the plat of the subdivision unless the deed of dedication contained a release of damages for subsequent grading of the streets, can only be shown by its records; for neither the city nor the public is bound to take knowledge of its acts or words unless they are of record.
6. ———: ———: ———: ———: **Power of Board: Abuse of Discretion.** Under the old charter of St. Louis declaring that "the Board of Public Improvements shall have authority to approve maps or plats of sub-divisions which fully dedicate to the public use, streets, alleys and public places," said board had authority to accept a deed of dedication or plat waiving damages for subsequent grading of the streets so dedicated, and having such authority it did not abuse its discretion by refusing to approve such plat or deed unless it contained a waiver of such damages.
7. ———: ———: ———: **Ultra Vires.** The acceptance by the City of St. Louis of a deed of dedication containing a waiver of damages for subsequent change in the grade of streets is not beyond the power of the city, nor of any statute, nor of any provision of the Constitution. And since the statute expressly provides that when property owners lawfully entitled to damages for grading a street "shall not have waived all right or claim thereto" ordinances providing for such grading shall also provide for ascertaining and paying the damages, there is no more proper or timely way of making a waiver of such damages than in the deed of dedication.

Appeal from St. Louis City Circuit Court.—*Hon Charles B. Davis*, Judge.

AFFIRMED.

Joseph Reilly for appellant.

(1) The "waiver" is void. (a) Because it attempts to permit the damage of private property for public use, contrary to the Constitution of Missouri, Article 2, Section 21. (b) Because there is no consideration mentioned therein to support the promise of the grantor in the deed of dedication to waive the contem-

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plated damages. *Hudson v. Browning*, 264 Mo. 58; *Bailey v. Austrian*, 19 Minn. 535; *Crane v. Crane & Co.*, 105 Fed. 869; *Riegart v. Coal Co.*, 217 Mo. 142. (c) Because it does not define and specify what is meant by all "claims for damages." *Hudson v. Browning*, 264 Mo. 58. (d) Because it empowers the defendant city to arbitrarily and despotically change the level of the street without restriction or limitation either as to the depths to which it might lower the street or to the heights it might elevate the street. Under the provisions of the "waiver" the city could lower the street to below the level of the bottom of the Dead Sea, or raise it to the cloud line. (e) Because there is no mutuality of promise. The city does not promise to make the street or to change the grade. It might make the street on the natural level of the surface of the ground or it might grade it as it pleased. There is nothing in the waiver to indicate what was in the minds of the parties. One party might have had the intention of making a great ditch in the street, while the other might have believed that the city would scratch the surface of the hills and throw a little earth on the street in the valleys. It is most probable that neither party at the time thought that any portion of this street would be dug down seven feet below the natural surface of the street, as was done in front of the plaintiffs' property, to their great damage. The deed of dedication was recorded June 25, 1909, the work done on the street was done in the year 1916, seven years after. *Cold Blast Trans. Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77; 40 Cyc. 259. "Before a waiver can be valid the parties sought to be bound thereby must have a full knowledge of all the facts appertaining to the thing waived." At the time of the execution of the "waiver" neither party had any knowledge of any of the facts, because they were not in existence at the time of its execution. A fact means something done, an act. There was nothing done at the time, so how could they have knowledge of something which was not only not executed, but not even in the minds or contemplation of

either of the parties† (f) Because it is against public policy. (g) Because the damages waived is coextensive only with the land dedicated, to-wit, the streets and alleys, as shown by the agreement of Alice B. Von Versen, the holder of the deed of trust on the land wherein she releases her rights under the mortgage to the land embraced in the streets and alleys. The "waiver" is void as to her. If the damage had accrued to her interests under the mortgage on the land she was not barred from her action for damages. The city knew that she had rights in all the property covered by the mortgage. It took the precaution to have her release as to the land embraced by the streets and alleys, but she was not joined in the waiver for damages. And she was a necessary party. The owner of the land could not make such an agreement without the holder of the deed of trust being a party thereto. If the "waiver" is void as to one it is void as to all, because it says, "All claims for damages." It would not cover possible or probable or certain damages to her, therefore it is void *ab initio* as to all. (h) Because it is *ultra vires*. (2) The "waiver" is a mere license, and was revoked by the grantor in the deed of dedication, when she sold the land covered and affected by the "waiver." Black's Law Dictionary; 25 Cyc. 640, 650. (3) The "waiver" is void because it is meaningless, ambiguous, indefinite and uncertain. McGuire v. Wilson, 187 S. W. 612; Delmar Inv. Co. v. Lewis, 196 S. W. 1137; Brick and Const. Co. v. Gentry County, 257 Mo. 392; Barber Asphalt Co. v. O'Brien, 128 Mo. App. 267; Coulter v. Brick & Const. Co., 131 Mo. App. 230; City of Poplar Bluff v. Bacon, 144 Mo. App. 476; Webb v. Aylor, 163 Mo. App. 476; Custer v. Springfield, 167 Mo. App. 354; Schulte v. Currey, 173 Mo. App. 578.

Chas. H. Daues, Oliver Senti and H. A. Milton for respondent.

(1) The waiver of damages for the grading of Beacon Avenue is not in violation of Article 2, Section 21, of the Constitution of Missouri. The Legislature and

courts of this State have declared that municipalities may and in some cases must secure a waiver of damages before changing the grades of their streets. R. S. 1909, secs. 9828, 9044, 9050; Sec. 5665, R. S. 1899; *McQuarter v. St. Joseph*, 134 Mo. App. 645. (2) Appellants' predecessor in interest, the dedicator, received a good and valuable consideration for the rights that she waived. This consideration was the approval of her plat by the city and the advantages resulting to her therefrom. These advantages were: First: The right to have the map or plat recorded, which could not be done without the city's approval. Old Charter, Art. 6, sec. 1. Second: The right to sell or offer for sale the lots in the subdivision which could not be done without incurring a penalty of \$300 for each lot sold or offered for sale, until the approval by the City through its Board of Public Improvements, permitting the recording of the plat. Sec. 8959, R. S. 1909. Third: The advantage of having the lots in the subdivision front or abut on the public streets and public alleys indicated on the plat, and this advantage is still enjoyed by the appellants. Without an approval of the plat and dedication the street in front of appellants' lot would not be a public street and the alley in the rear thereof would not be a public alley. (3) The waiver is not void for uncertainty as it included any claims for damages which might arise by reason of changing the then present surface of the streets and alleys to conform to such grades as might thereafter be established which clearly means and includes all claims that might arise by reason thereof. The language of the waiver is to be construed in the light of the circumstances surrounding the parties at the time it was executed and the intention of the parties gathered from the whole instrument. *Warne v. Sarge*, 258 Mo. 168. (4) The city had the power to grade its streets when the waiver was executed. Old Charter, Art. 3, sec. 6, cl. 2. The fact that damages had been waived could not affect the manner in which the power might be exercised. (5) The performance of an act is sufficient

inducement for a party entering into a contract. *Cold Blast Trans. Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77. The act inducing the dedicator to execute the waiver was the approval of the plat and dedication. Where the public is granted an easement the grantor is presumed to have intended that it will be exercised in the manner that its enjoyment by the public may require. *Julia Bldg. Assn. v. Bell Tel. Co.*, 88 Mo. 258. To safeguard the taxpayer of the city against damage suits resulting from the grading of Beacon Avenue by requiring the waiver of damages to be embodied in the deed of dedication is in keeping with sound public policy and those who seek the advantages which grow out of the subdividing of the property and the dedication of the streets therein should not be permitted to shift the burden thereof to the taxpayers of the entire city. Protection of the taxpayers from this burden has received the sanction of the Legislature and of the courts. R. S. 1909, secs. 9828; 9044, 9050 (Sec. 5665, R. S. 1899); *McQuarter v. St. Joseph*, 134 Mo. App. 645; *Taber Street No. 1*, 26 Pa. Sup. 107. (6) The language of a deed is to be construed against the grantee. *Grooms v. Morrison*, 249 Mo. 554; *Lineville v. Greer*, 165 Mo. 380. And in the light of the circumstances surrounding the parties at the time of its execution. *Warne v. Sarge*, 258 Mo. 168. (7) The act of the Board of Public Improvements in accepting and approving the deed of dedication embodying the waiver was not *ultra vires*. Old Charter, Art. 6, sec. 1. (8) A deed of dedication is not a mere license that may be revoked by a subsequent conveyance. *Pierce v. Chamberlain*, 82 Mo. 622; *Davis v. Railroad*, 119 Mo. 180; *Waldron v. Kansas City*, 69 Mo. App. 50; *Alton v. Columbia*, 145 Mo. App. 182. A condition in a deed of dedications runs with the land. *Snoddy v. Bolin*, 122 Mo. 479. The heirs and assigns are bound by the grantor's deed. R. S. 1909, sec. 2870.

SMALL, C.—Appeal from the Circuit Court of the City of St. Louis. The petition states that plaintiffs,

being the owners of certain real estate in the City of St. Louis on Beacon Street, the city established a grade on said street seven feet below the natural surface in front of plaintiffs' property, and graded the street to such established grade, whereby plaintiffs' property and improvements thereon were damaged in the sum of \$3000, for which they pray judgment.

The answer, besides a general denial, alleged that the damages sued for were waived by reason of the fact that when "Florissant Avenue Hill Sub-division was opened, and the streets and avenues and alleys therein were dedicated, there was embodied in the deed of dedication, the following clause: 'All of the avenues and alleys laid out in said subdivision, and for better identification etched on the above plat, are hereby dedicated to public use forever, and any claims for damages which may arise by reason of changing the present surface of said avenues and alleys to conform to such grades as, may hereafter be established by the city, are hereby waived,' which deed of dedication containing the above waiver and the plat referred to in the said deed was then and there accepted by the City of St. Louis, and all of which is recorded in Plat Book 18, at pages 60 and 61, in the office of the Recorder of Deeds in and for the City of St. Louis, Missouri, and that the property described in plaintiffs' petition, as well as that part of Beacon Avenue fronting and abutting thereon, is located in said Florissant Avenue Hills Subdivision."

The reply admitted and charged the making on the 6th day of April, 1909, by Josephine A. Collins, plaintiffs' grantor, of said deed of dedication and the due acknowledgment and recording thereof on June 26, 1909. It further set up the joinder in said deed of dedication of the holder of a mortgage but who did not waive said damages for grading. That on June 25, 1909, the day on which the Board of Public Improvements of said city accepted and approved said deed and the plat subdividing said land, said mortgages was duly recorded, and when defendant accepted said waiver of damages for

grading the streets, it did so with full knowledge that such waiver did not affect the rights of the holder of said mortgage. The reply further alleged that said waiver was void as to plaintiffs, because said Josephine A. Collins parted with the ownership of plaintiffs' property before said street was graded or damages accrued to said property, and before said Josephine A. Collins knew what she was waiving, as such damages were not then *in esse*; that there was no consideration for her making said waiver; that plaintiffs were not bound by said waiver, because no grade of said street was established when they bought said property; that they erected a substantial two-story brick dwelling on said property, and thereafter defendant city, by such grading, changed the natural surface of the street, whereby plaintiffs were damaged, as alleged in the petition. That said waiver is also void, because it is against the Constitution of the State of Missouri, Section 21, Article II, in that it permitted the damage of plaintiffs' property for public use without just compensation. The reply further alleged that plaintiffs claimed title by mesne conveyances from said Josephine A. Collins. There is no allegation that said mortgage was ever foreclosed, or that plaintiffs claimed title by any sale thereunder.

The city demurred to the reply, which the court sustained, and the plaintiffs, refusing to plead further, the court rendered judgment on the pleadings for the defendant.

Plaintiffs thereupon appealed to this court.

I. We think the learned court below committed no error.

There is no claim, on plaintiffs' part, that they were purchasers without notice of the deed of dedication made by their grantor, which released the public and the city from damages sued for in grading said street. The petition shows that the street was graded before plaintiffs brought their suit. The presumption is that the city acted upon said waiver of damage in grading said street, and, therefore, plaintiffs

Waiver:
Estoppel.

would be estopped to set up that there was no consideration therefor. Independently, however, of the plaintiffs being estopped by waiting until after the street was graded to complain of the want of consideration for such

Acceptance. waiver, we hold that the acceptance of the deed dedicating the street and containing the waiver of damages for grading was, in itself, a sufficient consideration to sustain both such dedication and waiver. It is alleged, in the answer and the reply, that the city and its Board of Public Improvements approved and accepted said deed of dedication with said waiver therein, and also the plat subdividing said property laying out said street. The acceptance of a ordinary deed of dedication is sufficient consideration on the part of the public. [Pierce v. Chamberlain, 82 Mo. l. c. 621; Borchers v. Brewer, 271 Mo. l. c. 141-2.] We see no reason why the same rule should not apply when, in addition to the usual dedication of the street, the proprietor also waives damages from grading, or dedicates the *right to grade* the street in favor of the public.

II. But, it is strenuously argued that the damages sued for are in the nature of a chose in action that did not belong to the said Josephine A. Collins, plaintiffs' grantor, because said damages had not then accrued to her land; that such waiver did not run with the land, and plaintiffs are not bound thereby; that the damages claimed only accrued after the plaintiffs became the owners of the property, and that they became entitled thereto under the Constitution of the State when such damages accrued, that the city's right was a mere license, and was revoked by the conveyance of said land to the plaintiffs, that the city's right to grade, granted by said waiver, is and was not an easement in plaintiffs' land.

**Damages to
Abutting
Property.** We must rule this contention against the plaintiffs. In our opinion said release and waiver of damages to the adjoining property in grading the street was incorporated in and part of the easement granted the public for

street purposes in the land dedicated for the street itself by said deed of dedication.

Prior to the adoption of the Constitution of 1875 the dedication of a street for public use, without more, was held (except in *Thurston v. St. Joseph*, 51 Mo. 510, where the court divided) not only to dedicate the right to use the natural surface, as a public highway, but also to change the grade of the natural surface, either by lowering or raising it, and all damage to the adjoining property caused thereby was considered *damnum absque injuria*. [*City of St. Louis v. Gurno*, 12 Mo. 414; *Taylor v. St. Louis*, 14 Mo. 20; *Hoffman v. St. Louis*, 15 Mo. 651; *Thurston v. St. Joseph*, 51 Mo. 510; *Clemens v. Ins. Co.*, 184 Mo. l. c. 53.]

By prohibiting the "damage" to, as well as "taking" of private property for public use without just compensation (the old Constitution only prohibited the "taking"), the Constitution of 1875 excluded the right to grade the street and damage adjoining property thereby, where there was a mere general dedication of the street for street purposes. Accordingly, in such cases, since the adoption of the Constitution of 1875, the adjoining landowner, when damaged by the grading of a street, has had his action therefor. [*Householder v. Kansas City*, 83 Mo. 488; *Sheehy v. Railroad*, 94 Mo. 574; *Clemens v. Ins. Co.*, 184 Mo. 46.]

But it has never been held that when the dedicator in his deed of dedication goes further and adds to such dedication an express provision, that the public may also grade the street in any way it sees fit, without paying damages, which the waiver in this case, in substance did, the public would still have to respond in damages for doing such grading.

We hold that the Constitution of 1875 did not prevent a proprietor of a subdivision of land, who wishes to subdivide it into lots and blocks and streets, avenues and alleys, from *expressly* making his dedication for street purposes, as broad and full as it was held by *implication* to be under the old Constitution, and to in-

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clude the right to grade the street, on the part of the public, without paying damages done to his adjoining land. He can give any right to the public in making such dedication, especially if the dedication is made by deed duly signed, acknowledged and recorded, he sees fit to give. This is well illustrated in the case of *Julia Bldg. Assn. v. Telephone Co.*, 88 Mo. 258. In that case, this court held that making an excavation in a street and placing and maintaining a telephone pole therein gave the adjoining property owner no cause of action for the injuries he sustained thereby, because that was one of the uses and purposes for which the street was originally dedicated, although the dedication was simply general, and contained no express provisions for the erection of telephone poles in the street. Judges HENRY and SHERWOOD dissented, but on the ground that such use was not embraced within the terms, express or implied, of the dedication, but they conceded that no suit for damages could arise to the adjoining landowner from any use embraced within the dedication. The majority opinion, uses this language (88 Mo. l. c. 274-5): "If, by reason of the dedication the public have the right to apply the private property of the plaintiff to the use proposed without his being entitled to compensation, how can it be that it becomes entitled to compensation for damages, flowing as an incident from an act, which the dedicator by his dedication, has authorized to be done? . . . If by dedicating property for a street, the dedicator gives up his right to compensation for the uses included in the dedication, how can it be said that he does not also give up his right to compensation for damages to adjacent property not taken, resulting from the application of the street to a use which by his dedication he authorized?"

In the case before us, the deed of dedication by plaintiffs' grantor to the city gave and dedicated to the public an easement to use and grade the land embraced within the street without payment of damages to her adjacent land, and such deed having been made, ac-

knowledge and recorded before plaintiffs purchased their property, they took title, subject and servient to such public easement. Such easement was an encumbrance on the plaintiffs' lot, which ran with the title thereto.

The nature of the rights of the city comes clearly within the definition and characteristics of an easement, as laid down in Black's Law Dictionary, quoted by learned counsel for appellants, to-wit: "A privilege which the owner of an adjacent tenement hath of another, existing in respect to their several tenements, by which that owner against whose tenement the privilege exists is obliged to suffer or not to do something on or in regard to his own land for the advantage of him in whose land the privilege exists." While the city, or the public, is not the technical owner of the fee in the land in the street, but holds it as trustee for the public for street purposes, its easement for street purposes makes it, in this case, the beneficial "owner of an adjacent tenement," having a privilege against the tenement "of another" by which the latter "is obliged to suffer something on or in regard to his own land for the advantage" of the former.

The public's right to grade without paying damages was, therefore, an easement, and not a mere license, revocable and revoked by the transfer of the land to plaintiffs, as contended by appellants' learned counsel.

111. It has also been suggested that the Board of Public Improvements refused to approve the plat of the subdivision unless the deed of dedication containing the release of damages for grading was also signed, which said board had no authority to do, and, therefore, said release was void. It is true, counsel for the city in their brief contend that said board would have refused to approve the plat unless said deed contained said waiver, as it was the policy of the board to do; but they so contend more by way of argument to show a consideration for

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such waiver, than as the statement of a fact, in this particular case. They nowhere suggest that the board acted officially, or that any record exists showing any such refusal, rule or policy. The said board could only speak and act by its record, and neither the city nor the public is bound to take notice of its acts and words unless of record. In any event, there is nothing in the record of this case showing any such refusal, nor anything other than a voluntary action of her own initiative, on the part of the plaintiffs' grantor, in making said deed of dedication.

IV. (a) It is said, too, that the Board of Public Improvements had no authority to accept a deed of dedication or plat waiving damages for grading the streets. We cannot agree to this contention. Section 1, Article VI, of the old Charter of St. Louis, in force

Power of Board. when this deed and plat were made, after providing that the streets laid out in such subdivisions should conform to the existing streets of the city, and that such plat should be submitted to said board for approval, and should be of no validity, and should not be recorded by the Recorder of Deeds, "until the approval of said board is endorsed thereon," provided as follows: "The Board of Public Improvements shall have authority to approve maps or plats of sub-divisions which *fully* dedicate to the public use, streets, alleys and public places, and which are made as herein required." (Italics ours). As we have seen, the waiver of damages herein was part of and appurtenant to the public easement in the streets given and dedicated for street purposes, and was, therefore, clearly authorized to be approved or accepted when contained in any such map or plat or deed by said board on behalf of the city.

(b) It also follows that said board would not abuse its discretion as to approving such plats and deeds of dedication connected therewith by refusing to approve them, unless they expressly waived damages in grading the streets, as well as dedicated them to public use.

Said board could not be held to abuse its discretionary powers in *requiring*, in such plats or deeds, such *full* public easement in the streets, as it was *authorized* to approve and accept on behalf of the city.

V. Nor can we find anything *ultra vires* the city, itself, in the law, or the city charter, nor anything contrary to the spirit of the Constitution, in the city accepting this deed of dedication with the waiver therein contained. Section 9828, Revised Statutes 1909, being Section 6239, Revised Statutes 1899, governing cities of 300,000 inhabitants or more, and which applied to the city of St. Louis at the date of said dedicatory deed, expressly provided that when property owners lawfully entitled to damages for grading a street "*shall not have waived all right or claim thereto*," then the ordinance providing for such grading should provide for ascertaining and paying such damages. There is no limitation as to the time or manner in which such property owners may make such waiver, and we can imagine no more proper way than by a deed duly executed, acknowledged and recorded as was done in this case, and no more proper time for so doing than the time when the property is platted into lots and blocks, and the street, avenues and alleys are dedicated to public use—as was done in the case before us.

The judgment below should be affirmed, in our opinion.

It is so ordered. *Brown C.*, dissents; *Ragland, C.*, concurs.

PER CURIAM:—The foregoing opinion by SMALL, C., is adopted as the opinion of the court. All of the judges concur.

**ALLUVIAL REALTY COMPANY, Appellant, v. HIM-
MELBERGER-HARRISON LUMBER COMPANY.**

Division One, April 9, 1921.

1. **COUNTIES: Boundary Between New Madrid and Pemiscot: Government Survey.** When the Legislature in 1851 made the junction of Portage Bay with Little River one of the calls in describing the boundary line between Pemiscot and New Madrid counties, it did not have in mind some point fixed by a Government survey, but merely the physical object, the junction of the two streams.
2. ———: ———: **Junction of Streams.** As a physical object, constituting a natural monument, the junction of Portage Bay with Little River, when the Legislature in 1851 fixed upon that junction as one of the calls in describing the boundaries between Pemiscot and New Madrid counties, was at the place where the waters of the bay, under normal conditions, flowed into those of the river and the bay lost its identity as a stream.
3. ———: ———: ———: **Center of Section Ten.** The Legislature, in 1868, in attempting to define the northern boundary of Pemiscot County fixed upon the "middle of Section Ten" as the western termination of the boundary, and by reversing the course and running due east from it, the location of another call, "the junction of Portage Bay with Little River," as it existed at the time of the passage of the act, is likewise fixed, and the boundary line is the east-and-west line through the middle of Sections Nine and Ten.
4. ———: ———: **Evidence: Practical Interpretation of Statute.** The "Government Tract Book of New Madrid County," the "New Madrid County Plat Book" certified by the Register of Lands, and testimony relative to the assessments by New Madrid County of the lands in the disputed territory, were all competent evidence upon the issue whether the lands are situate in Pemiscot or New Madrid County. Collectively they tended to show the interpretation put upon the Boundary Act of 1868, defining the boundary between the two counties, by the United States Land Office and by the executive department of the State, and to show that there was a practical location of the boundary, conforming to such interpretation, acquiesced in and treated as correct by the public authorities and the counties themselves for many years.

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5. ———: ———: **Quieting Title: Jurisdiction.** The Circuit Court of Pemiscot County, in a suit to ascertain and determine title, having determined that the lands were in New Madrid County, had no jurisdiction to adjudge "that the plaintiff has no right, title, claim or interest in and to said lands."

Appeal from Pemiscot Circuit Court.—*Hon. Sterling H. McCarty*, Judge.

AFFIRMED (*in part*); REVERSED (*in part*).

John A. Hope and *Ward & Reeves* for appellant.

(1) The court erred in dismissing plaintiff's petition and adjudging the land in question to be in New Madrid County. (a) This being swamp and overflow land, it passed to the State from the United States Government by Act of Congress, September 28, 1850, and by subsequent act of the Legislature said lands were donated to the counties in which they lie. 9 U. S. Stat. at Large, p. 519; Laws 1852-3, p. 108; Laws 1857, p. 32; Laws 1868, p. 69; Sec. 7995, R. S. 1909; *Russ v. Sims*, 261 Mo. 46; *Mosher v. Bacon*, 229 Mo. 338. (2) The first grant of this land by the State to the county was February 23, 1853 (Laws 1852-3, p. 108), which was subsequent to the establishment and fixing of the boundary of Pemiscot County on February 9, 1851. So the title to this land was never in New Madrid County. Neither State nor county can sell by patent or otherwise any land after having first granted same to another. Laws 1851, p. 190; *Mosher v. Bacon*, 229 Mo. 338; *Keaton v. Hamilton*, 264 Mo. 564. The right to a patent once vested as respects the Government is equivalent to a patent. *Johnson v. Fluetsch*, 176 Mo. 470; *Mosher v. Bacon*, 229 Mo. 350. (3) The statute fixing the boundary line of Pemiscot County begins at a northeast corner of the county in the middle of the Mississippi River and goes in a direction west to the point in controversy, and it uses this language: "Thence along the middle of said Collins Lake or Portage Bay, to its junction with Little River; thence due west

to the middle of Section Ten, in Township Twenty, North of Range Ten, east; thence due south to the southern boundary of the State, etc." Sec. 3599, R. S. 1909. (4) The Legislature, in using the word middle (of Section 10) did not use it with the same meaning as the word center. (5) The court will take judicial notice that the land is in Pemiscot County. *Keaton v. Hamilton*, 264 Mo. 564; *Woods ex rel. v. Henry*, 55 Mo. 563; *Parker v. Burston*, 172 Mo. 87; 17 Am. & Eng. Ency. Law (2 Ed.), pp. 9, 12, 13; 1 Greenleaf on Evidence (6 Ed.), p. 10. And when the county boundary is in question it is the duty of the court to construe the language of the statute fixing the boundary line. Sec. 8057, R. S. 1909; *State ex rel. v. Railway*, 105 Mo. App. 207; *Keeney v. McVoy*, 206 Mo. 65. (5) It is a well-settled rule of construction that natural and permanent monuments control artificial marks, courses and distances; and that natural monuments, artificial marks, and distances or area are usually controlled in the above named order. The general rule is that calls for natural or permanent objects in an entry, survey or conveyance will control other conflicting calls. This rule has been applied with respect to such objects as streams or rivers or a shore of a lake, etc. However, an unmarked line is not a natural monument within the rule. The principle on which calls for natural monuments are ordinarily given preference over other calls is that there is less likelihood of mistake in calls of this character. *Whitewell v. Spiker*, 238 Mo. 637; *Whitehead v. Regan*, 106 Mo. 235. Natural monuments and objects called for in deeds will control though they conflict with courses and distances; and where a deed calls for a river as a boundary this call will prevail over artificial monuments, courses and distances. *Campbell v. Clark*, 8 Mo. 553; *Myers v. City*, 82 Mo. 367; *Burnham v. Hitt*, 143 Mo. 414; *Peterson v. Beha*, 161 Mo. 513; *Jacob v. Mosely*, 91 Mo. 457. "Natural monuments" are such natural or permanent objects as streams, rivers, ponds, shores, beaches and the like. 5 Cyc. 869; 9 C. J. 161; 3 Washburn, Real Property (6 Ed.), sec. 2332; *Tiedeman on Real Property* (2 Ed.), sec.

831; *Goodson v. Fitzgerald*, 40 Tex. C. App. 619. "Artificial monuments" are landmarks and signs erected by the hand of man. 5 Cyc. 87; 9 C. J. 162. "A monument" is some tangible landmark established to indicate a boundary and is a fixed visible object. 9 C. J. 160; *Bouvier's Law Dictionary*; *Koch v. Gordon*, 231 Mo. 652. A subdivision line between two tracts of land which was the center of a certain section (as middle of Section 10), which is invisible and ascertainable only by measurement, and which is liable to differ in location according to the result of surveys, is not a monument. *Guitar v. St. Clair*, 238 Mo. 627; *Koch v. Gordon*, 231 Mo. 645; *Dolphin v. Klann*, 246 Mo. 487. The general rule is that the beginning point, when established, is determined to be of controlling authority; and if the starting point is fixed, certain and notorious, and there is a conflict between it and other calls the latter must give way to the former. But when succeeding calls are as readily ascertained and are as little liable to mistake, they are of equal dignity with the first, and when they all conflict with the first and agree with each other, their united testimony must control. *Hubbard v. Whitehead*, 221 Mo. 683; *Walsh v. Hill*, 38 Cal. 431; 9 C. J. 164. (6) Original corners as established by the Government surveyors are conclusive on all persons. 9 C. J. 164; 5 Cyc. 950; *Woods v. Johnson*, 264 Mo. 295; *Climmer v. Wallace*, 28 Mo. 559; *The Mayor v. Burns*, 114 Mo. 430; *Grandley v. Davis*, 156 Mo. 429. It is well settled in this State that the field notes of the United States surveys of public lands made prior to their conveyance to the State, or to private persons, will control in ascertaining locations of corners, lines and locations. *Lbr. Co. v. Ripley County*, 270 Mo. 135; *Bradshaw v. Edlan*, 194 Mo. 640; *Carter v. Hornback*, 139 Mo. 243; *Shelton v. Maupin*, 16 Mo. 124.

Oliver & Oliver for respondents.

(1) This is an action at law under the statute to determine title, and was tried before the court without

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the intervention of a jury. No instructions were asked and none were given. The finding of the trial court takes the place of a verdict by jury and as such is not subject to review on appeal. *Woods v. Johnson*, 264 Mo. 293; *Smith v. Royse*, 165 Mo. 657; *Hatton v. St. Louis*, 264 Mo. 646; *Chilton v. Nickey*, 261 Mo. 242; *Zimmerman v. Ry. Co.*, 156 Mo. 565; *Sutter v. Raeder*, 149 Mo. 307.

(2) Under the issues, it was essential that appellant prove the title to the lands in dispute, having failed to do so it has no standing in this court. The appellant having averred it was the "absolute owner" must support that averment or it fails. *Wheeler v. Land Co.*, 193 Mo. 283; *Stewart v. Land Co.*, 200 Mo. 288. (3) No conveyance of the lands in suit was made by the State prior to the act of the General Assembly of 1868; and that act did not have the effect of passing title to Pemiscot County. *Simpson v. Stoddard County*, 173 Mo. 449; *Carmen v. Johnson*, 20 Mo. 108; *Sturgeon v. Hampton*, 88 Mo. 203. (4) Nor did the act of the General Assembly of 1869, in itself, vest the title of swamp lands in the counties in which said lands were situated. It required the issuance of a patent before title vested. *Laws 1869*; *Hamilton v. C. B. & Q. Railroad*, 124 Ill. 243. (5) The court did not commit reversible error in permitting the respondent to show: (a) That the lands in suit had been accepted by New Madrid County and had been assessed by the county officials of that county. The fact that these lands had been claimed by New Madrid County since 1875, when the patent was made to it by the Governor, was a fact the court might properly consider, in determining the conduct and action of the two counties with reference to the acceptance and location of the lands in suit. What weight the court attached to such testimony is another question. What weight the court actually gave to this evidence, if any, is not shown by the record, therefore no prejudice can be attributed to its admission. (b) Nor did the court commit reversible error in permitting the respondent to offer the "Plat Book" of New Madrid County. This book is a record which the law requires counties

in this State to procure from the register of the United States land office. Sec. 11363, R. S. 1909. The statute makes the entries appearing on this "Plat Book" competent evidence. Secs. 6290 and 6289, R. S. 1909. (c) Nor did the court commit reversible error in permitting respondent to offer the "Swamp Land Abstract" book of New Madrid County. This book seems to have been made for the convenience of the county court of New Madrid County in disposing of its swamp lands and was an ancient record in the office of that county. (d) Nor did the court permit any error in permitting the respondent to introduce the "Tract Book" of New Madrid County which shows the lands in suit are located in New Madrid County and shows that the line dividing New Madrid from Pemiscot County runs from the center of Section Ten, Township Twenty, Range Ten, through a tier of sections until it intersects the waters of Little River in Section Nine, Township Twenty, Range Twelve. Secs. 1 and 9, Laws 1868, pp. 68-9-70; Secs. 7995 and 8000, R. S. 1909. (e) Nor did the court commit reversible error in permitting the respondent to show where the (middle of this) channel or thread of Portage Bay water intersects, joins or flows into and with the water of Little River. This was competent as shown by the testimony of W. B. Rossiter. The intersection of the banks of Portage Bay with the east bank of Little River was not the same place where the waters of the two streams came together. The statute refers to a "junction" of waters; not land. *Hubbard v. Whitehead*, 221 Mo. 682. f) Nor did the trial court commit reversible error in permitting the surveyors, N. C. Frissell and F. M. Robbins to explain in detail how and what a surveyor would have to do in establishing, ascertaining and running the line that separates the two counties. *Hubbard v. Whitehead*, 221 Mo. 682. (6) The General Assembly in passing the Statute of 1868 fixing the boundary line, clearly intended that the line should be a straight one without fractionalizing any legal subdivision of any government survey. This intention of the lawmakers should prevail; and the court in ascertain-

ing that intention will take into consideration the facts and circumstances existing and known to the lawmakers at that time. Laws 1868, p. 19; Sec. 3599, R. S. 1909; Hubbard v Whitehead, 221 Mo. 682; Cooley v. Warren, 53 Mo. 168. (7) This court had conclusively and definitely settled the location of the northwest corner of Pemiscot County to be the center (middle) of Section Ten, Township Twenty, Range Ten. You have declared this a fix monument. It was the precise point or definite monument that the Legislature intended for the corner between the counties of Pemiscot and Dunklin and to be the controlling monument in fixing the north boundary of Pemiscot County, or the south boundary of New Madrid County. That question is, therefore, a closed one. Pemiscot County v. Wisconsin Lumber Co., 240 Mo. 377.

RAGLAND, C.—Statutory action to determine title to real estate instituted in the Circuit Court of Pemiscot County, October 19, 1917. The petition alleges in substance that the plaintiff is the owner in fee simple of the south half of the north half of Section Eight, containing one hundred and sixty acres, and the south half of the north half of Section Nine, containing one hundred, fifty-five and 28/100 acres, all in Township Twenty, north, of Range Eleven, east, in Pemiscot County, Missouri; and that the defendant claims some title, interest, or estate therein, adverse to plaintiff. The prayer is conventional.

The answer consists of a plea in abatement and one in bar. In the first it is averred that the lands in question are not in Pemiscot County, but that they are situated in New Madrid County, and on that ground it challenges the jurisdiction of the Circuit Court of Pemiscot County to determine any question affecting their title. In the second, after a denial of the allegations of the petition as to the location of the lands and plaintiff's title thereto, it is averred that the lands in controversy are situated in New Madrid County and that the defendant is the sole and absolute owner of them.

It was admitted that the title to the lands in controversy passed from the United States to the State of Missouri under the Act of Congress of September 28, 1850, commonly known as the Swamp Land Grant. The acts of the Legislature donating the lands and prescribing the boundaries of Pemiscot and other counties were read in evidence. Documentary evidence was introduced showing that on November 2, 1891, Pemiscot County issued to Louis Houck a patent to the lands in controversy; that on May 25, 1899, New Madrid County issued a like patent to John H. Himmelberger; and that severally through mesne conveyances the plaintiff acquired whatever title passed under the Pemiscot County patent, and the defendant whatever passed under that of New Madrid County.

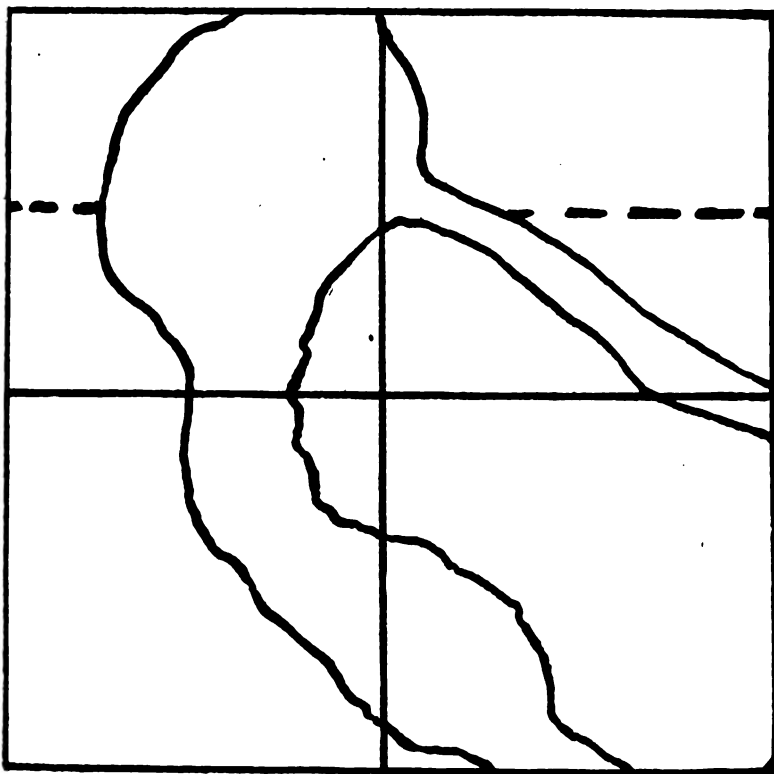
Over the objections of plaintiff, defendant put in evidence what was designated as the "Government Tract Book of New Madrid County" and the New Madrid County Plat Book. The "Tract Book" purported to contain a list of all lands granted to the State of Missouri by the United States that were situated in New Madrid County and was duly certified August 24, 1869, by the Register of the United States Land Office at Iron-ton, Missouri. The Plat Book was certified May 19, 1875, by the Register of Lands for the State of Missouri. Both included the lands in controversy as being located in New Madrid County. The Plat Book portrayed the boundary line between New Madrid County and Pemiscot as following Portage Bay into Little River, running thence with the course of the stream southwest to the quarter section line between the north and south halves of Section Nine, Township Twenty, north, Range Twelve, east, and thence due west with the quarter section lines of the intervening sections to the center of Section Ten, Township Twenty, north, Range Ten, east. Defendant also read in evidence a patent from the State of Missouri to New Madrid County, purporting to convey to that county, among others, the lands in question.

The act organizing Pemiscot County and prescribing its boundaries was passed February 9, 1851. [Laws 1851, p. 190.] The territory of the new county was therein described as follows: "All that portion of New Madrid County lying south of line beginning in the middle of the main channel of the Mississippi River, immediately opposite Major's mill race, and running thence along said mill race to the Cushion Lake byou; and thence along said Cushion Lake byou, to the Cushion Lake; thence along the middle of said Cushion Lake to a point opposite to the head of Collins Lake, or Portage Bay; thence along the middle of Collins Lake or Portage Bay to its junction with Little River; *thence due west to the eastern boundary of Dunklin County.*" In 1868 an act, amendatory of the general statutes then in force defining county boundaries, was passed. This act redefined and fixed the boundaries of twenty odd counties—Dunklin, Pemiscot and New Madrid, among others. It describes the line between New Madrid and Pemiscot in the same language as the Act of 1851, except as to the last call, which was made to read: "*thence due west to the middle of Section Ten (10), in Township Twenty (20), north, of Range Ten (10), east.*" [Laws 1868, pp. 20 and 21.] The only boundary of Pemiscot County affected by the amendment was that between it and Dunklin County on the west. Theretofore its west boundary (the east boundary of Dunklin County) had been a line extending due south from the intersection of the west edge of the Little River Swamp with parallel of latitude 36 degrees and 30 minutes north; it now became a line beginning at the middle of Section Ten, Township Twenty, north, of Range Ten, east, and running thence due south to the southern boundary of the State.

The boundaries of Pemiscot County as defined by the Act of 1868 have never been changed. [Sec. 9382, R. S. 1919.] The line in dispute begins at the junction of Portage Bay with Little River and runs "thence due west to the middle of Section Ten," etc. The two

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streams unite in Section Nine in Township Twenty, north, of Range Twelve, east. A certified copy of the plat of said Township Twenty, made June 1, 1852, under the direction of the Surveyor General of the United States from the field notes of the survey thereof, was offered in evidence by the plaintiff. The Surveyor General's certificate recites that the west boundary and the north boundary east of Little River and part of the subdivision lines were surveyed in 1848, and that the survey of the township was completed in January and February, 1851. The following is a reproduction of so much of the plat as shows the boundaries of Section Nine, the meanders of Little River and Portage Bay therein and the subdivision lines of the section:



Scale 10 chains to the inch.

From certified copies of plats obtained from the General Land Office, introduced in evidence by the plaintiff, it appears that the surveys of Township Twenty, north, of Range Eleven, east, and Township Twenty, north, of Range Ten, east, were completed in 1858 and in 1860, respectively; that is, the boundaries had been run and the townships sectionized.

The plat of Section Nine, Township Twenty, Range Twelve, east, herein before reproduced, discloses that the subdivision line between the north and south halves of the north half of the section passes between the points of intersection respectively of the north and south meander lines of Portage Bay with the east meander line of Little River. It further shows that the subdivision line just mentioned is a short distance south of the intersection of the middle line of Portage Bay with the east meander line of Little River.

The meander lines indicate that Little River at the place where Portage Bay flows into it is three-eighths of a mile wide. According to the oral testimony they correctly represent the river in that respect as it was at the time of the survey and as it continued to be until as late as 1898—before the work of reclamation was actually begun in that territory. The west side of the river at that point, however, was nothing more than a brush covered swamp; the open water and current at normal stages were, generally speaking, on the east side. There was a high, well-defined bank along the lowland on the east side, and through an opening in this bank Portage Bay flowed in its course to join the river. The point where the waters of the two streams actually came together is left uncertain. Otto Kochtitzky, a surveyor of many years experience and a witness for plaintiff, testified that he last saw Little River where Portage Bay empties into it in 1898, and that at that time the river opposite the opening in the high bank just referred to was about 400 feet wide; he did not say, however, how near its waters approached the high bank at that point. Being asked where the thread of the stream was along there, he said: "As I remember it, the deeper

part of the channel of Little River follows the east side down to pretty near the mouth of the bay, maybe three or four hundred feet north, then sweeps across to the open water on the west side for a distance. That is not a continuous and well defined channel; the deep places show themselves occasionally along the general channel of the river, and at very low water the deep places will almost show to be perfectly flat, almost no channel at all." He also testified that the course of Portage Bay where it discharged its waters into Little River was northwest; that it formed almost a perfect right angle with the river. In explanation of that statement he said that he did not regard the place where the waters of the two streams came together as their junction, but the place where the outer or high water banks joined. Plaintiff called as witnesses two other surveyors who had had occasion some eighteen or twenty years before to inspect Little River where it was joined by Portage Bay. They testified merely that the junction of the two streams was correctly defined by the Government meander lines. W. B. Rossiter, County Surveyor of New Madrid County, a witness for defendant, made an examination of the channels of the river and the bay in the vicinity of their junction a few months before the trial. at that time the river had been drained—all the water withdrawn, and the bay was very low—just a few little puddles. He testified that the bay in its approach to the river comes upon in a northwest course and just before it gets to the river turns to the southwest; that by projecting a line equally distant between the meanders of the bay it would intersect a median line of the river at the quarter section line (east and west) of Section Nine.

Defendant introduced in evidence over the objections of the plaintiff: (1) A book that had been kept for many years in the office of the County Clerk of New Madrid County, designated as the "Swamp Land Abstract for New Madrid County, Missouri;" it was not identified by any official certification, nor was it shown by whom or under what authority it was made; it contained a list of the lands in controversy. (2) An

order of the County Court of Pemiscot County, made May 25, 1903, reciting that the county lines between Pemiscot, New Madrid and Dunklin Counties were indefinite and had not been permanently located, and directing the county surveyor to proceed with the surveyors of the other counties named to establish the line. And (3) testimony tending to show that the lands within the disputed territory had for many years been assessed for taxes by New Madrid County.

The cause was tried to the court. No declarations of law were asked or given. The court found the issues for the defendant, and rendered a judgment wherein it was adjudged that the lands in controversy are situated in New Madrid County, and that plaintiff's petition be dismissed. It was further adjudged that the plaintiff had no right, title or interest in and to said lands.

From the judgment so rendered, plaintiff in due course perfected its appeal to this court.

Appellant's contentions may be epitomized to this effect: Plaintiff, by documentary evidence and by oral testimony that was uncontradicted by any substantial competent evidence, made a case establishing its title; this court should, therefore, reverse the judgment *nisi* with directions to the court below to enter judgment for plaintiff.

As already indicated by the statement of facts, the disposition of this controversy, both as to the merits and with respect to the jurisdiction of the Circuit Court of Pemiscot County to hear and determine it, depends solely upon a determination of the location of the boundary line between Pemiscot and New Madrid Counties. That is the sole question at issue. If the land is in Pemiscot, it belongs to the appellant; if in New Madrid, to the respondent.

I. According to appellant a line drawn from the junction of Portage Bay with Little River (Section Nine, Township Twenty, north, Range Twelve, east) would lie just a quarter of a mile south of the northern boundary

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of the tier of sections between the termini; that is, it would be along the subdivision lines bisecting the north halves of those sections.

According to respondent such line would be a quarter of a mile still further south coincident with the quarter section lines extending east and west through the centers of the sections. It is apparent, therefore, that the locations of both termini are in question.

Appellant takes the position that the location of the junction of Portage Bay with Little River is fixed and determined by the United States Survey. This, because the monuments or corners as established by the Government are, as a matter of law, conclusive; and because the Legislature is presumed to have defined the boundary with this survey in mind. Based on the premise that the beginning point is definitely located by the Government survey, appellant states, or rather assumes, that the boundary line runs thence west on the quarter section lines bisecting the north halves of the sections. But if this premise were sound, still the boundary would not be coincident with the subdivision lines just referred to. If the point of beginning is to be determined from the plat, it would be where the middle line of Portage Bay intersects the east meander line of Little River and, as already indicated, that point is some distance *north* of the quarter quarter section line. If, therefore, appellant's hypothesis be correct, the Legislature intended to so run the boundary as to put indefinite fractional parts of the *north* halves of the north halves of the sections through which it runs into each county.

Recurring to the propositions advanced by appellant as grounds for its contention that the junction of Portage Bay with Little River is fixed by the Government survey, it is sufficient to say, as to the first, that even if the rule of law that monuments and corners established by the United States are conclusively deemed to be correct were applicable, still it would avail appellant nothing in this case. The Government surveyor did not attempt to locate or mark the junction of the two streams, he merely surveyed the meanders of their outer or high-water banks.

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As to the second, it affirmatively appears that the meanders of these streams were surveyed in January and February, 1851. It is extremely improbable that the Legislature had any knowledge of the survey, even if completed, when it passed the first act defining the boundary between Pemiscot and New Madrid Counties on February 9, 1851. Besides, there is no reference to a survey, either directly or impliedly, anywhere in the act. It describes the boundary line as beginning in the middle of the channel of the Mississippi River, extending thence westwardly along certain water courses to the junction of Portage Bay with Little River, and thence due west to the eastern boundary of Dunklin County. It is apparent, therefore, that the Legislature, when it made the junction of Portage Bay with Little River one of the calls in describing the boundary lines, did not have in mind some point fixed by a Government survey, but merely the physical object, the junction of the two streams.

As a physical object, constituting a natural monument, the junction of Portage Bay with Little River was at the place where the waters of the bay, under normal conditions, flowed into those of the river and the bay lost its identity as a distinct stream. [Rowe v. Lumber Company, 133 N. C. 433, 440.] If the plat had been the only evidence offered relating to the place of the junction, it would, perhaps, have necessitated a finding that it was at the east meander line of Little River between the meander lines of Portage Bay. But there was other evidence and it tends to show the contrary. Plaintiff's witness, Kochtitzky, testified that in 1875 and 1898 Little River at the place in question had no continuous well defined channel, that the deeper part of it followed the east side down to pretty near the mouth of the bay—three or four hundred feet north—then swept “across to the open water on the west side.” It is true that he said that the junction of the streams was at the opening in the high bank on the east side of the river but it is plain that he was giving his opinion as an expert and not testifying to the physical conditions as they

existed. When defendant's witness, Rossiter, made an examination a few months before the trial, the waters of the two streams had practically disappeared. Little River had been drained and Portage Bay had dried up. The high banks of both and the channel of the bay apparently were unchanged. He testified that the bay just before reaching the river turned southwest; and that if the thread of its channel were projected in the direction of its southwest course, it would intersect the median line of Little River, as fixed by the survey of its meander lines, on the quarter section line (east and west) of Section Nine.

II. Owing to the transformations and partial obliterations of the water courses in that territory, effected by works of reclamation, it would no doubt be difficult, if not impossible, to determine, independently of the subsequent calls in the statutory description of the boundary line, the precise point where the waters of Portage Bay joined those of Little River in 1851 or in 1868. The next call is "the middle of Section Ten, in Township Twenty, north, of Range Ten, east," and the point called for is described as "due west of the junction of Portage Bay with Little River." Appellant insists that this call should be construed as though it read: "the middle *line* of Section Ten." This, on its theory that the junction of Portage Bay is at a point between the northern boundary and the center of Section Nine from which a line could not be projected due west to the center of Section Ten, but from which it could be so projected to some point on the middle line (north and south) of that section. But appellant having failed to establish its theory as to the place of the junction of the two streams, the reason, or necessity, for a construction that would add the word "line" after the word "middle" fails with it. There does not seem to be room for serious controversy as to what the Legislature meant by the words, "middle of Section Ten." In *Pemiscot County v. Lumber Co.*, 240 Mo. 377, involving an interpretation of the same language, but as descriptive of the boundary between Pemiscot

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Line.

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and Dunklin Counties, we held that "middle," as used in the Boundary Act with reference to Section Ten, was synonymous with "center." In connection with what was said in that case, we might add that the Legislature in all boundary acts, including that of 1868, in establishing county boundaries, almost invariably followed the plan of making such boundaries conform to the lines of natural barriers, or the lines or regular subdivision lines of Government surveys. When the Act of 1851 was passed cutting Pemiscot off of New Madrid County, the surveys of the boundaries of the townships through which the division line between the two counties passed was just being completed. The townships were not then sectionized. But when the Act of 1868 was passed the section and quarter section corners had been established, and we find the Legislature redefining the part of the boundary extended due west from the junction of Portage Bay with Little River by making it terminate at the middle of Section Ten instead of at the eastern boundary of Dunklin County, which prior to the passage of the act was a line extending south from the west edge of Little River swamp. And our holding in Pemiscot County v. Lumber Co., *supra*, was, in substance, that the legislative intent, as expressed by the act, was that the western boundary of Pemiscot County should be on the quarter section lines (north and south) of Section Ten rather than on a line equidistant between the east and west boundaries of that section. So with reference to the northern boundary, we think it more reasonable to suppose that the Legislature, in splitting a row of sections eleven miles long with a county boundary, intended that such boundary should be coincident with the quarter section lines rather than with one that would, for no apparent reason, put indefinite fractional parts of the subdivisions through which it passed into each county.

III. If the center of Section Ten is the termination of the disputed boundary, and we so hold, then by reversing the course and running due east from it, the location

Middle of
Section 10.

of the junction of Portage Bay with Little River, as it existed at the time of the passage of the boundary acts, can be ascertained and all difficulty with respect to the boundary thereby obviated. [Ayers v. Watson, 137 U. S. 584, 604.]

IV. "The Tract Book," the Plat Book, the patent from the State to New Madrid County, the "Swamp Land Abstract for New Madrid County" and the testimony relative to the assessments by New Madrid County of the lands in the disputed territory, were all properly received in evidence. They were competent because collectively they tend to show the interpretation put on the Boundary Act of 1868 by the United States Land Office and by the executive departments of the State. And further, that there was a practical location of the boundary, conforming to such interpretation, which had been acquiesced in and treated as correct by the public authorities and the counties themselves for many years. Such practical location of a public boundary should not be disturbed unless it be clearly and unmistakably shown to be erroneous. On that ground alone the trial court's finding, on the facts in proof, would be justified. [Union County v. Essex County, 43 N. J. L. 391; Hecker v. Sterling, 36 Pa. St. 423.]

V. The finding, however, that the lands in controversy are situated in New Madrid County disclosed the narrow limits of the court's further jurisdiction. The judgment is reversed in so far as it attempts to adjudge "that the plaintiff has no right, title, claim or interest in and to said lands;" in all other respects it is affirmed. *Brown and Small, CC., concur.*

PER CURIAM:—The foregoing opinion of *RAGLAND, C.*, is adopted as the opinion of the court. All of the judges concur, except *Elder, J.*, not sitting.

**SAMUEL JAMES BOPST v. EUGENE F. WILLIAMS,
BESSIE B. WILLIAMS et al., Appellants.**

Division One, April 9, 1921.

1. **JURISDICTION: Appointment of Guardian: Collateral Attack.** An allegation that plaintiff minor and his mother were not residents of a certain county in Oklahoma, but of an adjoining county, and that therefore the county court of the particular county had no jurisdiction to appoint a guardian for him, is a collateral attack, and cannot succeed, when made in a suit in this State to annul the guardian's sale of the minor's lands.
2. **GUARDIAN: Married Woman: Competent to Sell Real Estate.** A married woman, competent under the laws of the foreign state of her residence to be guardian of a minor child residing there, may be permitted by the probate court of this State to sell the minor's lands. The statute (Sec. 411, R. S. 1919) does not require the foreign guardian to possess the qualifications required of a resident guardian, but only requires that the non-resident minor shall have "a guardian in the state or territory in which he resides."
3. **GUARDIAN'S BOND: Signed by Attorney: Civil Action.** The statute of Oklahoma prohibiting licensed attorneys from signing bonds as surety "in any civil or criminal action" has no application to a guardian's bond filed in the probate court of this State. It was not given in a "civil action."
4. **SALE OF NON-RESIDENT MINOR'S REAL ESTATE: For Reinvestment.** Section 411, Revised Statutes 1919 (Sec. 49, R. S. 1855), says that "when a non-resident minor, owning real estate in this State has a guardian in the state or territory in which he resides, the probate court in the proper county may authorize his guardian to sell such real estate and receive the proceeds thereof;" and that and the preceding sections do not confine the sale to the sole purpose of supporting and educating the minor, nor is the power to sell limited to a sale for any stated purpose; nor is a sale by the foreign guardian invalid because the petition and the order say a sale and reinvestment in the State of the guardian's and minor's residence would be to the best interest of the minor, for those things are not required by the statute to be stated in either.
5. **——: Contingent Remainder.** A contingent remainder in lands is a vendible interest by a person *sui juris* or under execution,

despite the fact that the person or persons who will ultimately take cannot be determined until the death of the life tenant; and if the apparent remainderman is a minor, his contingent interest can be sold by his guardian when properly authorized by the probate court.

6. ———: **Payment of Purchase Price: Dissipation.** The failure of the guardian to account in the proper court for the purchase price of the minor's land, or the dissipation or embezzlement of it by the guardian, does not concern the grantee if the sale was otherwise good; and a recital in the probate record, repeated in the deed, of the receipt of the purchase price in cash cannot be disproved to defeat the title of an innocent purchaser, without notice and for value, from the purchaser at the sale.
7. ———: **Appraisal of Contingent Remainder.** Where the life tenant's interest was computed at a sum substantially less than its value when computed by the statutory tables, and the minor's contingent interest was appraised at a sum in excess of the value of an indefeasible and vested remainder, the appraisal furnishes no basis for an attack upon the sale by the guardian of the minor's contingent interest.
8. ———: **Sale to Guardian.** Under the statute, and in the absence of a statute, a purchase by the guardian of the minor's real estate, directly or indirectly, even though approved by the probate court, and even though the sale is at a fair price, is ground, in itself, upon which the interested party may avoid the sale; and whether the deed be held void on its face, or only voidable, is immaterial in a suit in equity in which all the facts showing plaintiff's right to avoid the sale are set up in the petition.
9. ———: **Sale to Guardian's Husband.** A sale of the minor's land by the guardian to her husband is voidable in a suit by the minor to set it aside, under the statute and at common law, even though it was at the appraised value and confirmed by the court. And although she had a life estate which would preclude dower vesting in her, yet whatever interest her husband took by her guardian's deed she would have been entitled to share by election under our statutes had she survived him; and on the ground of prospective interest, and on the additional ground which arises out of the nature of the marriage relation, she should be considered a purchaser "indirectly."
10. ———: ———: **Innocent Purchaser.** The relation between the guardian and vendee may be shown by the records through which defendant derains title; and where the decree in partition recites that the guardian and W. E. Shenk are "husband and wife" and says that she has a life estate and her minor child a remainder in

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the land set off to them, and she as guardian of the minor sells the minor's interest to "William E. Shenk" and Shenk's deed to defendant contains a recital of the relationship of William E. Shenk and his wife (the said guardian), the defendant purchased with notice that the grantee in the guardian's deed was her husband.

11. —: **Allowance for Improvements.** Where the trial court held that the guardian's deed conveying the land should be set aside, and the plaintiff did not file a motion for a new trial nor appeal, he cannot be heard to complain in the appellate court of the amount allowed to defendant for improvements.

Appeal from Atchison Circuit Court.—*Hon. John M. Dawson*, Judge.

AFFIRMED.

L. D. Ramsay and *H. B. Williams* for appellants.

(1) The court erred in finding that the purchaser did not pay for the land at guardian's sale. The guardian's deed recited payment of the purchase money. Our statute makes such deed prima-facie evidence of the recitals therein contained. *Kerney v. Vaughan*, 50 Mo. 286; Sec. 435, R. S. 1909; Sec. 11927, R. S. 1909; *Exendine v. Morris*, 8 Mo. App. 383. There is no evidence or circumstance that contradicts the prima-facie case above mentioned. (2) Our statute is: "nor shall the guardian or curator become the purchaser, either directly or indirectly, of any of the property of his ward sold." In *Burton v. Compton*, 150 Pac. 1080, the Oklahoma court held guardian's deed made to his wife absolutely, void, on the ground that he would, at her death, inherit one-half of her property and, therefore he was interested in the sale. The court cited the Kansas case of *Frazier v. Jenkins*, 57 L. R. A. 575. This case in Kansas also held such a deed absolutely void, and both cases decided that because the deed was void rather than merely voidable, it could be attacked in a collateral proceeding. Both the Oklahoma case and the Kansas case above cited, cite as authority for the decision: *Tyler v. Sanborn*, 128 Ill. 136, and *Davore v. Fanning*, 2 Johns. Ch. 252. In both these

cases cited, the deeds under similar circumstances were held to be voidable only and not absolutely void, and in the Fanning case the purchase money was ordered refunded as a condition precedent to setting the deed aside. Our case must be tried by the law of Missouri. Whatever be the law of Kansas and in Oklahoma, in this State, the order approving the sale by the probate court is a final judgment of the probate court, is in the category of *res judicata*, and cannot be reached by collateral attack. Covington v. Chamblin, 156 Mo. 587. It is well settled law of this State that final judgments of the probate court in matters within their jurisdiction, are as conclusive as those of courts of general jurisdiction. Camden v. Plain, 91 Mo. 117; Rowden v. Brown, 91 Mo. 429; Price v. Springfield R. E. Assn., 101 Mo. 107; Sherwood v. Baker, 105 Mo. 472; Macey v. Stark, 116 Mo. 481; Rogers v. Johnson, 125 Mo. 202; Cox v. Boyce, 152 Mo. 576. As late as 1876, an administrator was permitted to buy at his own sale in Missouri. Grayson v. Weddle, 63 Mo. 539; Strauss v. Ranheim, 59 N. Y. Supp. 1054; Crawford v. Gray, 30 N. E. 885; Epperson v. Postal Tel. Co., 155 Mo. 346; Hoffman v. McCracken, 168 Mo. 343. (3) In the petition we are not charged with notice that the court in Oklahoma had no authority to appoint, or that the law of that state forbade an attorney signing the bond, or that an attorney did sign the bond, nor that the purchaser was husband of the guardian, nor that he failed to pay the purchase money to the guardian, and were not charged with notice of consequent damages to plaintiff. Without such notice, this defendant is an innocent purchaser. Shelton v. Franklin, 224 Mo. 363. The evidence in the case cannot supply lack of necessary allegations in the petition. Shelton v. Horrell, 232 Mo. 358, 371; Dorrance v. Dorrance, 242 Mo. 668. (4) This very matter was presented to the probate court by plaintiff's mother, plaintiff's guardian, plaintiff's representative, and the probate court considered and passed on it. Donnell v. Wright, 147 Mo. 647. (5) To vitiate a judg-

ment because fraudulent, the fraud must be actual as contradistinguished from a judgment obtained on false evidence, or a forged instrument on the trial. *Nichols v. Stevens*, 123 Mo. 116; *Dorman v. Hall*, 124 Mo. App. 9; *Leiber v. Leiber*, 239 Mo. 34; *McDonald v. McDaniel*, 242 Mo. 176; *Cross v. Gould*, 131 Mo. App. 602; *Hamilton v. McLean*, 169 Mo. 70; *Pelz v. Bollinger*, 180 Mo. 258; *Covington v. Chamblin*, 156 Mo. 587. (6) "To allow the heirs or anyone else, in a collateral proceeding, to question the correctness of the judgment of the court, would so imperil the titles conveyed at administrators' sales of lands that no prudent man would bid their value." Courts do not favor it because against public policy and the weight of authority. *Carr v. Spanagel*, 4 Mo. App. 284; *Pearson v. Murray*, 230 Mo. 167; *McClanahan v. West*, 100 Mo. 324; *Jopling v. Walton*, 138 Mo. 485. (7) The Probate Court of Atchison County had general, original and exclusive jurisdiction of the parties and the subject-matter. The guardian made application to sell, under Section 441, and introduced her evidence as required by that section, that the court might examine it and judicially determine therefrom whether to exercise his jurisdiction. It passed on that very question. It is *res judicata*, not subject to a collateral attack. *Johnson v. Beazley*, 65 Mo. 250; *Sims v. Gray*, 66 Mo. 616; *Scott v. Crews*, 72 Mo. 261; *Camden v. Plain*, 91 Mo. 129; *Rowden v. Brown*, 91 Mo. 429; *Brawford v. Wolfe*, 103 Mo. 395; *Williams v. Mitchell*, 112 Mo. 308; *Rogers v. Johnson*, 125 Mo. 213; *McKinzie v. Donnell*, 151 Mo. 450; *Cox v. Boyce*, 152 Mo. 582; *Desloge v. Tucker*, 196 Mo. 601; *In re Estate of Jarboe v. Jarboe*, 227 Mo. 99; *Pearson v. Murray*, 230 Mo. 167; *Dorrance v. Dorrance*, 242 Mo. 662. (8) It is urged below by plaintiff that guardian sold ward's land to her husband, and for that reason the sale was void. The authorities relied on by plaintiff to sustain that contention, held that a guardian may sell the ward's land to

husband or wife of guardian, provided the guardian procures an order from the court authorizing such sale, prior to selling. The courts of this State have held time and again that an administrator is regarded as the officer or agent of the court in making the sale, and that sales of real estate under order of the probate court are judicial sales, and the confirmation of such sales by the probate court is the crowning act and covers all prior irregularities, provided, of course, that the court had obtained jurisdiction of the subject-matter and over the parties. It follows that, if the court, with knowledge of the facts, may make such order prior to the sale, it can, when such facts are conveyed by the report of the sale made by guardian, the court's agent, ratify the same by an approval of the sale. *Blickensderffer v. Hanna*, 231 Mo. 110; *Noland v. Barrett*, 122 Mo. 188. So that if the court knew the husband purchased and approved the sale, it is good, and if he did not know it, and approved the sale, it is good.

P. C. Simons and Hunt & Bailey for respondents.

(1) The jurisdiction of probate courts is regulated by statute, and they are courts of limited jurisdiction; there is no statute authorizing them to exercise equitable jurisdiction. *Jenkins v. Marrow*, 131 Mo. App. 288. (a) They have no common law or equity powers. They are purely creatures of the statute, and where there is no statute giving them power to act and they do not act within their implied powers, such act is without jurisdiction and *coram non judice*. They possess only such powers as are conferred on them by statute. *St. Louis v. Hullsatt*, 175 Mo. 79; *Ford v. Talmage*, 36 Mo. App. 65; *Bradley v. Woener*, 46 Mo. App. 371; *Nicholas v. Rayburn*, 55 Mo. App. 1. (b) Inferior tribunals, not proceeding according to the course of common law, are confined to the authority given them by statute, and the grounds of their jurisdiction must affirmatively appear on the face of the proceedings. *State v. Metzger*, 26 Mo.

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66; Sawyer v. Burris, 141 Mo. App. 112; State ex rel. v. Johnson, 138 Mo. App. 306. (2) A purchaser at a judicial sale purchases at his peril. The maxim, *caveat emptor*, applies to all such sales. And a sale by an administrator, executor or curator under the order of the probate court is a judicial sale. Talley v. Schlattitz, 180 Mo. 238; Froley v. Bulware, 86 Mo. App. 674; Hewett v. Weatherby, 57 Mo. 276; Mann v. Best, 62 Mo. 491; Throckmorton v. Penby, 121 Mo. 50. (3) Every instrument filed in the office of the recorder, for record, shall, from the time of filing same, impart notice to all subsequent purchasers, and, if they fail to discover the defect in the title to the land, they are without remedy. R. S. 1909, sec. 2810; Miller v. Whitson, 40 Mo. 97; Crane v. Dameron, 98 Mo. 567; Weir v. Cordez, 186 Mo. 388; Williams v. Butterfield, 214 Mo. 412. When the conditions which the law declares shall constitute constructive notice are shown to exist, the presumption of such notice is conclusive, and no evidence will be permitted to overthrow or impair it. Prewitt v. Prewitt, 188 Mo. 675. One who has notice of a fact which ought to have put him on inquiry and which he might have discovered by using due diligence, cannot claim to be a purchaser without notice. Siches v. Bombousek, 193 Mo. 113; Scott v. Gordon, 109 Mo. App. 695; McAdo v. Wright, 128 Mo. App. 358. (4) The administration laws and the laws governing curators or guardians (of late years the first term having been embraced in the latter, to much confusion) are *in pari materia*, and must be construed together. Laney v. Browning, 112 Mo. App. 195. The title to the land was in the respondent, and not in his guardian, Edith P. Shenk. Zellers v. Surety Co., 210 Mo. 86; Silierst v. McNally, 223 Mo. 505. (5) If the court had no jurisdiction of the subject-matter, or the person, or if the court exceeded its powers or acted outside of its implied powers, it being an inferior court not proceeding according to the course of the common law, in either event, the judgment may be attacked collaterally, for a judg-

ment so rendered is void, a nullity. Freeman on Judgments (3 Ed.), p. 112, secs. 117, 120. Stark v. Kirchengraber, 186 Mo. 633; Hutchison v. Shelby, 133 Mo. 400; Cloud v. Inhabitants of Pierce City, 86 Mo. 356; Adams v. Cowels, 95 Mo. 501; Davis v. Montgomery, 205 Mo. 271; Moss v. Fitch, 212 Mo. 484; Land Co. v. Land Co., 187 Mo. 420. (6) Judgment rendered outside the issues presented by the pleading or where court pleadings on their face do not give the court jurisdiction, the judgment is void. Blackburn v. Bolan, 88 Mo. 81; Strouse v. Dennon, 41 Mo. 289; State ex rel. v. Bird, 253 Mo. 569. (7) The County Court of Blaine County, Oklahoma, had no jurisdiction to appoint a guardian or curator for this respondent. Neither the curator, nor the ward, lived in Blaine County, Oklahoma, but in Garfield County, Oklahoma, fifty miles northeast of Blaine County. The bond given was a nullity. The court who took it knew it was a nullity, and Baker, the attorney for Edith P. Shenk, so stated to the court at the time it was filed, and stated that a new bond would be filed. Yet the court certifies this spurious bond to the Probate Court of Atchison County. We are forced to believe, from this record, that William E. Shenk, the moving spirit, Ed. Baker and Judge Malcomb were in a conspiracy and colluded together to rob this infant child of its patrimony. Moss v. Fitch, 212 Mo. 484; Morx v. Force, 51 Mo. 69; Gofer v. Stover, 59 Mo. 87; Hester v. Frank, 189 Mo. App. 40; Barlow v. Steel, 65 Mo. 612. (a) The proceedings of the Probate Court of Blaine County, Oklahoma, can be attacked collaterally. If a judgment from another state should be brought here and suit instituted on it, the plea of *nil debit* would be good defense against it. Freeman on Judgments (2 Ed.) p. 586, secs. 559, 560, 561, 562 and 563; Callahan v. Griswold, 9 Mo. 784; Morx v. Force, 51 Mo. 69; Ward v. Quintiven, 57 Mo. 425; Napton v. Yeater, 71 Mo. 358; Bradley v. Welch, 100 Mo. 258; Wonderly v. Lafayette Co., 150 Mo. 635. (8) At the time land was sold married women could not act as curator. R. S. 1909, sec. 417. This section is mandatory.

A foreign curator or a foreign judgment has no extra judicial rights over a domestic curator of judgment. The real estate of a minor can only be sold in strict compliance with the statutes authorizing the sale, and then only for the purposes mentioned in the statute. R. S. 1909, secs. 171, 431, 432, 433, 439, 449 and 441; Bomfort v. Lucas, 21 Mo. 598; Williamson v. Monroe, 125 Mo. 574; Bone v. Tyrell, 113 Mo. 175; Chamber's Admr. v. White's Heirs, 40 Mo. 483; Walls v. Fleming, 19 Mo. 454; James v. Russik, 12 Mo. 63. (a) They must show that the statutes have been complied with. Plaster v. Graber, 160 Mo. 669; Cooley on Torts (1 Ed.), p. 523; Stevenson v. Kilpatrick, 166 Mo. 262. (b) A curator stands upon the same grounds as a trustee. A curator is, in law, a trustee, and is charged in handling trust property with vigilance and solicitude. Kent's Commentaries (1 Ed.), 438; Hynds v. Hynds, 274 Mo. 123; Van Raettie v. Epstein, 202 Mo. 173; Stitt v. Stitt, 205 Mo. 155. (c) Where the rights of infants are involved, courts will not search for technical rules to sustain the transaction. Winter v. K. C. Cable Co., 73 Mo. App. 193; In v. Steel's Estate, 97 Mo. App. 9.

JAMES T. BLAIR, J.—This is an appeal from a judgment of the Atchison Circuit Court, which holds invalid a guardian's sale of land and cancels certain deeds.

James A. Campbell, who died in 1889, devised his lands to his four children in equal shares, except that he provided the share of Edith P. Campbell should go to her for life and at her death should go to her bodily heirs. In 1900 Edith P. Campbell married one Logan. Respondent was born of this marriage. In 1902 Edith P. Logan, *nee* Campbell, divorced her husband, and, in 1904, married William E. Shenk in the State of Oklahoma. Respondent is her only child. August 26, 1907, heirs of two of James A. Campbell's devisees began suit to partition the lands he devised. There were numerous defendants; among others, "Edith P. Shenk and W. E.

Shenk, her husband, and James Logan'' (this respondent) ''a minor.'' The land was divided in kind, and that involved here was allotted to Edith P. Shenk for life, remainder to her bodily heirs, as provided by the will. December 19, 1907, Edith P. Shenk was appointed guardian of respondent by the County Court of Blaine County, Oklahoma. She gave bond in the sum of \$8,000, signed by Ed. Baker and W. E. Shenk as sureties. In January, 1908, Edith P. Shenk filed in the Probate Court of Atchison County her application, as foreign guardian, for an order to sell the interest of respondent in the land in suit. She accompanied this with authenticated copies of the record of her Oklahoma appointment and of the bond given in that State. The order of sale was made January 20, 1908. The interest of respondent was appraised at \$3600. February 12, 1908, Edith P. Shenk reported she had sold respondent's interest to William E. Shenk for \$3600 at private sale. The sale was approved and a deed executed and delivered pursuant thereto. May 9, 1908, William E. Shenk and Edith P. Shenk, his wife, conveyed the land in suit to W. A. Williams, who conveyed to appellant E. F. Williams in January, 1909. The latter executed a trust deed to the corporate appellant. In 1913 Edith P. Shenk died. Subsequently William E. Shenk was appointed guardian of respondent by the county court of Oklahoma. There was never any settlement or accounting made to the Oklahoma court by either guardian. The only papers or records are those of about the time Mrs. Shenk was appointed and the subsequent appointment of Shenk to succeed her. An aunt of respondent, Mrs. Bopst, discovered that Shenk was inattentive to the rights of her nephew, whom she thereafter adopted and of whose affairs she took charge. At her instance this suit was begun. Respondent took the name of his adoptive mother.

The petition assails the transfer of the property by the guardian and the subsequent deeds on many grounds. Some of these go to the jurisdiction of the County Court of Blaine County, Oklahoma, to appoint Mrs. Shenk

guardian of her son, and some to the jurisdiction of the Atchison County Probate Court to order the sale of the land in suit. The sale is also attacked for fraud on several grounds. Details are subsequently given.

I. Respondent urges that the evidence shows he and his mother did not live in Blaine County, Oklahoma, but in an adjoining county, and that this deprived the County Court of Blaine County of jurisdiction to appoint a guardian. Let it be assumed it would be so in that State. Respondent's petition in this case expressly alleges he and his mother were residents of Blaine County. Further, the evidence which indicates the contrary was not offered to make this issue. It was incidental. The same witness testified in support of the allegation of the petition. In any event, this particular attack is collateral and cannot succeed. [Cox v. Boyce, 152 Mo. l. c. 582; Langley v. Ford, 171 Pac. l. c. 472, 473.]

II. It is urged that since our statute then in force (Sec. 417, R. S. 1909) did not permit a married woman to be curatrix of the estate of a minor and since Edith P. Shenk was a married woman, she had no power to act in this State in the proceeding to sell respondent's interest in the land in suit. It is not contended her married state affected her competency under the law of Oklahoma, in the State of residence of herself and of respondent. The Missouri statute which authorizes a foreign guardian to proceed to sell in this State property or interests of his non-resident ward does not require that such guardian shall possess the qualifications necessary to appointment in this State as guardian or curator. With respect to that the sole requisite is that the non-resident minor shall have "a guardian in that state or territory in which he resides;" and if that condition is met, so far as concerns this present contention, a probate court in this State is authorized to permit the foreign guardian to sell. [Sec. 411, R. S. 1919.]

III. Respondent contends the Probate Court of Atchison County was without jurisdiction to order the sale because the bond of the guardian, given in Oklahoma, was signed by the guardian's attorney and there is a statute in that State which, he insists, renders this bond void for the reason it was so signed. The bond was signed by Edith P. Shenk, as principal, and W. E. Shenk and Ed. Baker, as sureties. Baker was a practicing lawyer of Oklahoma and represented Mrs. Shenk in the proceedings for her appointment as guardian in that State. The statute referred to reads as follows:

**Guardian's
Bond.**

"Licensed attorneys of this State are prohibited from signing bonds as surety in any civil or criminal action, in which they may be employed as counselors, pending or about to be commenced in any of the courts of this State, or before any justice of the peace. All such bonds shall be absolutely void and no penalty can be recovered of the attorney signing the same."

Without Baker's signature the bond would not have been good for the amount required by Section 411, Revised Statutes 1919. The bond in this case does not fall within the statute quoted. It was a guardian's bond. Respondent assumes the bond was given in a "civil action." A "civil action" implies adversary parties and an issue or issues and is designed for the recovery or vindication of a civil right or the redress of some civil wrong. [Berry v. Berry, 147 Ind. 176; Iowa v. C., B. & Q. R. Co., 37 Fed. l. c. 498; In re Battle's Est., 158 N. C. 388; Lanning v. Gay, 70 Kan. 353; Ex parte Bailey, 1 Okla. Cr. R. l. c. 119; Maben v. Rosser, 24 Okla. l. c. 598; 1 C. J. sec. 8, p. 930; 1 R. C. L. sec. 11, p. 325.] In many states, e. g., Oklahoma, statutory definitions of like tenor have been adopted. "An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." [Sec. 5536, Comp. Laws, Okla. 1909.] Secs. 5537, 5538, 5539

Bopst v. Williams.

and 5540 of the same Laws read as follows: "5537. Special proceeding.—Every other remedy is a special proceeding." "5538. Kinds of action.—Actions are of two kinds: First, Civil; Second, Criminal." "5539.—Criminal Action. A criminal action is one prosecuted by the State as a party, against a person charged with a public offense, for the punishment thereof." "5540. Civil Action.—Every other is a civil action." When the actions defined in Section 5539 are subtracted from all actions, as defined in Section 5536, the remainder defines "civil actions" in a manner oftentimes approved. The Constitution of Oklahoma excludes probate causes from the term "Civil Action." [Welch v. Barnett, 34 Okla. l. c. 170.] We do not mean to be understood as taking judicial notice of the statutes of Oklahoma. Those statutes are cited as typical and as, in fact, containing the ordinary definition of a civil action. The act respecting sureties which was offered in evidence clearly shows that "civil actions" exist in the State of Oklahoma. Since the statutes quoted were not offered in evidence, it is necessary to turn to the general definition of the words. That definition makes it clear that the bond involved in this case was not a bond given in a civil action; and, of course, there is no contention it was given in a criminal action. Such statutes are not extended by construction to subjects not within their purview. [Half-acre v. State, 112 Tenn. l. c. 611, 612; Lewis v. Higgins, 52 Md. l. c. 618.] It follows that the statute in evidence does not extend to guardians' bonds.

IV. The petition for the sale of the minor's interest alleged, among other things, that on account of reasons stated in detail, "it would be to the best interest of said minor . . . to sell" his interest in the land in question, transfer the proceeds to Oklahoma, where both guardian and ward resided, "there to be invested in other lands. . . ." in the ward's name. The prayer was for an order of sale "for the purpose aforesaid." In the order of sale it is stated and found that "the rents and profits of

Sale for
Reinvestment.

said land so situated" (as set out in the petition) "are wholly insufficient to pay the charges and expenses necessary to support and educate said minor." It further recited that it was shown the proceeds could be invested in Oklahoma to "much greater advantage and to the greater interest of said minor."

Respondent insists the probate court had no power to order a sale of a non-resident minor's realty for re-investment; that such a sale could be ordered solely for the support and education of such minor. His position seems to be that Section 409, Revised Statutes 1919 (Sec. 439, R. S. 1909), is the only section giving power to sell such non-resident minor's realty, and that Section 411, Revised Statutes 1919 (Sec. 441, R. S. 1909), is designed merely to provide safeguards for a sale under Section 409. The right of a foreign guardian to deal with the real property his non-resident ward owns in this State depends, in so far as concerns the question now being considered, upon the existence of statutory authority. As early as 1845 (R. S. 1845, pp. 554, 555) the statute permitted a foreign guardian of a non-resident ward to remove such ward's personalty to the State of their common residence. At an earlier date (Sec. 8, p. 295, R. S. 1835) the statute authorized the sale of a resident minor's realty to defray the expenses of his education. In 1855 there were added to the chapter on Guardians and Curators three sections (Secs. 47, 48, 49, pp. 831, 832, R. S. 1855) which are substantially the same as Sections 409, 410 and 411, Revised Statutes 1919. These are the sections respondent argues were all passed for the single purpose of authorizing a sale of land for the education and support of a non-resident minor. We do not deem this the correct construction. Section 47, page 831, Revised Statutes 1855 (now Sec. 409, R. S. 1919), made the non-resident minor's realty in Missouri available for his support and education just as the resident minor's land was already available for his education under Section 24, page 826, Revised Statutes 1855. Section 47 (now 409) clearly has in view

Section 8, page 823, Revised Statutes 1855 (Sec. 382, R. S. 1919), which requires the appointment of a curator for a non-resident minor owns property in this State, and contemplates his retention of such of the minor's personalty as is not ordered paid over to the foreign guardian and the payment by the curator to such guardian of the proceeds of sales of personalty and rentals of realty under proper orders therefor. Section 48 (now 410) confirms this construction and requires the curator appointed in this State, if so ordered, to loan proceeds of sales of the minor's realty and pay over the interest to the foreign guardian from time to time. It is obvious that Section 49 (now 411) is much broader in its language. Sections already cited provided for the removal from the State of a non-resident minor's personalty and for the discharge of the person formerly in custody of it. It seems clear that the Legislature intended by Section 49, *supra*, to provide for a like transfer of the value of the non-resident's realty to the State of his residence. The language of the section is: "When a non-resident minor, owning real estate in this State, has a guardian in the state or territory in which he resides, the probate court in the proper county may authorize his guardian . . . to sell such real estate and receive the proceeds of sale . . . " The remainder of the section has to do with safeguards by which the exercise of this power is surrounded. Such safeguards were and are not required under the two preceding sections, because under them the court determines the amounts proper to be paid over from time to time and retains the remainder in the hands of the resident curator. The quoted language of Section 49 (411, R. S. 1919) is unconditional. The power to sell is not limited to a sale for a stated purpose. It is evident a sale for a transfer to the minor's home state was intended. Since the statute did not condition the exercise of the power, the allegations of the petition with respect to the reasons for desiring the transfer, i. e. a more advantageous investment, are to be construed as designed to induce the probate court to

order the sale. Since no reason was required to be stated to give jurisdiction, jurisdiction was not lost because the guardian included in her petition a statement of commendable motives. The learned probate judge need not have stated in his order that the sale was for the support and education of the minor. The statute did not require it in a case like this. So far as the present question is concerned it comes down to this, i. e. that the petition and order of sale stated the facts necessary to show the statute applied to respondent's property, and then stated other things not required to bring the matter within the statute and which did not affect its applicability. This excess of statement did not invalidate the order. [Strouse v. Drennan, 41 Mo. l. c. 298; Bone v. Tyrrell, 113 Mo. l. c. 185.] The ruling in Johnson v. Beazley, 65 Mo. l. c. 258, does not affect the Strouse decision on this point.

V. Respondent also contends that though it be held the statute (Sec. 411, R. S. 1919) authorizes the sale of a non-resident minor's real estate, it did not authorize the sale of his interest in the tract in question. The words "real estate" when used in a statute include "lands, tenements and hereditaments" (Ninth Subd. of Section 7058, R. S. 1919) and the statute applicable to this case contains no exceptions. [Ansell v. Bridge Co., 223 Mo. l. c. 220 et seq.] Whether or not respondent's interest was an estate in lands, it was an interest vendible by a person *sui juris* and under execution, despite the fact that the person or persons who are to take could not be determined until the death of the life tenant. [Godman v. Simmons, 113 Mo. l. c. 127, et seq.; Summet v. Realty & Brokerage Co., 208 Mo. l. c. 514; Parrish v. Treadway, 267 Mo. l. c. 96; Stockwell v. Stockwell, 262 Mo. l. c. 686; Sikemeier v. Galvin, 124 Mo. l. c. 372; Eckle v. Ryland, 256 Mo. l. c. 440; Armor v. Lewis, 252 Mo. l. c. 589.] Under the doctrine of this court (Oldaker v. Spiking, 210 S. W. l. c. 62, 63) such an interest when owned by a minor legally can be sold under proper orders of the probate court.

**Sale of
Contingent
Remainder.**

VI. It is contended the purchase price was not actually paid and that, therefore, the sale was and is void. The evidence relied upon to show non-payment seems to be that tending to show the guardian did not account for the money in the County Court of **Payment.** Blaine County, Oklahoma. The guardian's deed recited payment in full in cash to the guardian, and that recital is prima-facie evidence of the fact. [Sec. 404, R. S. 1919.] The embezzlement or dissipation of the ward's money by the guardian would not concern appellants if the sale was otherwise good. [Exendine v. Morris, 8 Mo. App. l. c. 389.] It would not, of itself, render the sale void. [Thaw v. Ritchie, 136 U. S. l. c. 548; Fritzgibbon v. Lake, 29 Ill. l. c. 178, 81 Am. Dec. 302 and note; Mulford v. Stalzenback, 46 Ill. l. c. 309; Strouse v. Drennan, 41 Mo. l. c. 299; Harper v. Smith, 89 Ark. l. c. 288.] And a recital in the probate court record, repeated in the deed, or the receipt of the purchase price in cash cannot be disproved to defeat the title of an innocent purchaser, without notice and for value, from the purchaser at the sale. [Worthington v. Dunkin, 41 Ind. l. c. 525, 526; Cottrell v. Cottrell, 7 Ky. L. Rep. l. c. 672, 673.]

VII. The life tenant was twenty-five years of age when the sale was made. The whole property was appraised at \$9,000. The ward's interest therein was appraised at \$3600. The value of the life estate **Appraisal.** was therefore computed at \$5400, which is substantially less than its value when computed by the statutory table. [Chap. 70, R. S. 1919.] The contingent interest of respondent was thus appraised at a sum in excess of the value of an indefeasible and vested remainder in the whole property. There is no claim the land was then worth more than \$9000. The appraisal furnishes no basis for an attack upon the validity of the sale.

VIII. Section 402, Revised Statutes 1919, provides: "The court may order such real estate to be sold at public or private sale, or it may, in its order, provide

that the guardian may sell at either public or private sale, at his option; but in no case shall the same be sold for less than three-fourths of its appraised value, nor shall the guardian or curator become the purchaser, either directly or indirectly, of any of the property of his ward sold under the provisions of this article."

Sale to
Guardian's
Husband.

In *Miller v. Staggs*, 266 Mo. 1. c. 456, it was held that under this section a sale for less than three-fourths of the appraised value of the ward's realty was void. The decision approves a former decision (*Carder v. Culbertson*, 100 Mo. 269) in which it was held with respect to a like sale under the then existing statute respecting sales by curators, that the confirmation of the sale was *coram non judice* and the deed showing the sale for less than the prescribed sum "was void on its face." Whether the express provision in the succeeding section (Sec. 403, R. S. 1919) to the effect that the court shall not approve a sale for less than three-fourths of the appraised value of the property distinguishes the clause in Section 402 relating to appraised value from that respecting a purchase by the guardian is a question it is not deemed necessary to determine in this case. Even without such a statute as Section 402, a bill in equity will lie to set aside, after confirmation, a sale at which the person selling purchases either directly or through another. It is a fraud for which, in any event, an interested party may avoid the sale. [Rorer on Judicial Sales, secs. 572, 573, 574.] In the cases subsequently cited it will be found there is some authority for the proposition that at common law such a sale is absolutely void. Other authorities hold such sales voidable. In view of the character of this proceeding it is unnecessary to decide in this case whether the rule is one or the other. The facts showing the right of respondent to avoid the sale on the ground that the guardian had an interest in the purchase are all set up in the petition. The suit is in equity, and this mode of setting aside a sale and deeds of guardians to themselves is authorized

by the decisions holding such a sale voidable only. That such a purchase by the guardian, directly or indirectly, is ground, in itself, upon which an interested party may avoid the sale, even in the absence of a statute, is well settled. [Davoue v. Fanning, 2 Johns. Ch. R. l. c. 255, et seq.; Scott v. Gamble, 9 N. J. Eq. l. c. 236; Michoud v. Girod, 4 How. 552; Kruse v. Steffens, 47 Ill. 112; Bland v. Fleeman, 58 Ark. l. c. 90; Houston v. Bryan, 78 Ga. l. c. 185.] The rule is "not remedial but preventive," and the fairness of consideration in a particular case cannot be shown to affect its applicability. [James v. James, 55 Ala. l. c. 531; O'Connor v. Flynn, 57 Cal. l. c. 295, 296; Grubbs v. McGlawn, 39 Ga. l. c. 675; Gilmore v. Thomas, 252 Mo. l. c. 155; Calloway v. Gilmer, 36 Ala. l. c. 362; Michoud v. Girod, supra; Lockwood v. Mills, 39 Ill. l. c. 608; Davoue v. Fanning, supra; Scott v. Gamble, supra.] "The rule . . . applies in all its force to guardians, and the disqualification attaches to the fiduciary character, independent of the mode of sale, the incapacity extending as well to judicial or other sales under adverse proceedings, as to those made by the guardian under his powers as such." [Calloway v. Gilmer, 36 Ala. l. c. 359.] In that case the sale had been made under order of the probate court and was set aside. A like case is Cain v. McGeenty, 41 Minn. 194.

The particular ground upon which the petition in this case proceeds on this point is that the rule applies to the sale in question because the purchaser was the husband of the guardian. In Gregory v. Lenning, 54 Md. l. c. 58, it was held the husband of the guardian might buy at a sale of the ward's land, because "the sale was not made by the guardian to her husband, but was made by the court through its trustee." In Davoue v. Fanning, supra, the sale was for the purpose of raising a particular legacy for the executor's wife. The executor "by previous arrangement, suffered the property to be bought in" for her. Chancellor Kent said: "Whether a trustee buys in for himself or his wife, the temptation to abuse is nearly the same. . . . His in-

terest here interfered with his duty. . . . Indeed, the very fact that the executor, in that instance, was exercising the general powers of his trust for the benefit of his wife, was peculiarly calculated to touch and awaken the suggestion of self-interest. The case, therefore, falls clearly within the spirit of the principle, that if a trustee, acting for others, sells an estate, and becomes himself interested in the purchase, the *cestui que trust* is entitled to come here, as of course, and set aside that purchase." In *Strauss v. Bendheim*, 162 N. Y. l. c. 476, the court recognized this general rule, but refused to apply it where the record showed (1) the sale was confirmed with full knowledge of the relation, (2) the *cestuis que trustent* did not attack the sale, (3) the question was not raised until twenty-six years later, and (4) then raised by an apparent stranger to the proceedings as an objection to the marketability of the title in a suit to compel his specific performance of a contract to purchase. In *Tyler v. Sanborn*, 128 Ill. l. c. 143 et seq., it was held that a sale by an agent to his wife, the principals being without knowledge of the relation, fell within the rule and was voidable. It was said that the husband still had an interest in his wife's property, by virtue of certain statutes, which would vary by virtue of the increase or decrease of the wife's interest in realty during coverture, and that her emancipation did not leave him disinterested therein; that, further, their relation was such, in itself, as to enlist his interest in her material welfare, independently of his financial interest therein and thereby bring his interest into conflict with his duty in a sale to her. In *Louden v. Martindale*, 109 Mich. 242, the husband of the administratrix bought at her sale. The court did not discuss the effect of the relation. It seems not to have been in the mind of the majority of the court as a feature to distinguish the case from one in which no such relation between seller and buyer existed. The case was ruled upon the question whether the husband's

reconveyance to his wife was proof of a purchase for her. One judge dissented. He briefly stated he thought "the sale by Mrs. Burns, as administratrix, to her husband, by which, if authorized, at least an inchoate right of dower would vest in her was invalid." The majority did not discuss or mention this suggestion. In *Brown v. Fischer*, 77 Minn. 1, an infant and another sued in the district court to set aside a probate court sale of the infant's realty. The mother of plaintiffs had a life estate in the property, and plaintiffs took the remainder under their father's will. The mother became plaintiffs' guardian and secured an order to sell their interest. She sold, at private sale, to her husband, plaintiffs' step-father, and confirmation was secured through concealment of the relation the guardian and purchaser bore to each other. A Minnesota statute was in force which prohibited a guardian from directly or indirectly purchasing or being interested in the purchase of any part of the real estate he sold. It was held that the statutory rights of a wife in her husband's property, contingent upon her surviving him, gave her such an interest as to bring the sale within the prohibition of the statute and of the common-law rule, and a finding against the validity of the sale was affirmed. In *Frazier v. Jeakins*, 64 Kan. 615, a guardian of minors, under order of sale by the probate court, sold at private sale to her husband. The sale was confirmed. Subsequently the guardian and her husband sold to Frazier, who bought with notice. It was held the sale was void. On the question in the instant case it was held the wife's interest under Kansas statutes in realty owned by her husband invalidated the sale under a statute resembling Section 402, Revised Statutes 1919. The general rule was quoted and held to apply. It was held that while the statutory rights referred to were not common law estates they were, nevertheless, property, and that the relation, itself, of husband and wife, was of a character to bring duty and interest into conflict, the thing which both the statute and the general rule sought to prevent. The court cited several decisions.

It quoted from *Bassett v. Shoemaker*, 46 N. J. Eq. 538, l. c. 542, in which an executor sold to his wife his testator's farm: "The exclusion of the wife as a purchaser, where the husband sells as a trustee, is not so much for the reason that he may subsequently become entitled to some interest in her lands, as on account of the unity which exists between them in the marriage relation. The case falls clearly within the spirit of the principle which excludes the husband himself." In *Burton v. Compton*, 50 Okla. 365, the purchaser at a guardian's sale under order of the probate court was the guardian's wife. The court held the statutory interest of the husband in the wife's estate and their natural identity of interest by reason of the relation between the husband and wife brought the sale within the general rule and the prohibition of the statute law of the State. In *Chastain v. Pender*, 52 Okla. 133, the same holding was made in a case in which the sale had been made by an administrator to his wife. In *Langley v. Ford*, 171 Pac. (Okla.) l. c. 473, it was held that a guardian's sale and deed to a third person, followed by a deed from the latter to the guardian's wife, could be set aside at the instance of an interested party in an action brought for that purpose in a case in which there was shown a collusive agreement to bring about the result attained. A like holding is found in *McGaughey v. Brown*, 46 Ark. l. c. 32. In Georgia it was held: "The principle which renders an agent incompetent to purchase from himself renders him alike incompetent to sell to his wife. . . . No one can doubt that the husband has a beneficial though" (in Georgia) "not a legal interest in the property of his wife." [*Reed v. Aubrey*, 91 Ga. l. c. 438, 439.]

The statutes of this State give the wife a prospective interest in the real property of the husband. In this case the wife's life estate would preclude dower vesting in her, but in whatever interest the husband took by her guardian's deed she would have been entitled to share by election under our statutes in case she

had survived him. The additional consideration, adverted to in the cited cases, which arises out of the nature of the marriage relation, is also of much force. It seems to us that the application of the statute should be so made as to exclude, where reasonably possible, the violation of the principle it formulates and diminish opportunities to defraud those dependent upon the integrity of guardians for the preservation of their rights. There is nothing harsh in the statute so construed and innocent purchasers will not be harmed thereby.

There is one decision, *Crawford v. Gray*, 131 Ind. 53, which holds a sale made in "good faith," without "fraud or collusion" to the highest and best bidder cannot be set aside on the ground that the purchaser was the wife of the executor making the sale. No authorities are cited. The statutes emancipating married women are quoted, and the ruling practically rests upon the result they have effected. We think the rule of the cases first cited is correct and so hold.

IX. Did appellants have notice? They all claim under respondent. The title they took at the time of the conveyance under which they claim were the life estate of Edith P. Shenk and the interest of respondent, under the Campbell will, as set off in the partition suit. They expressly admit that in that case it was "decreed and adjudged that Edith P. Shenk and W. E. Shenk were husband and wife and that Edith P. Campbell was a daughter of James A. Campbell, deceased, and that defendant James Logan is a son of Edith P. Shenk by a former husband and is a minor." The relation between the guardian and the vendee at her sale is thus shown by the records through which the title of appellants is deraigned. The judgment in partition bound respondent and his mother and all who claim under them. [Sec. 2023, R. S. 1919.] It was also of record in the office of the Recorder of Deeds. [Secs. 2024, 2198, 2199, R. S. 1919.] The documentary foundation of the title under the guardian's sale, coupled with the

Rohlf v. Hayes.

recital of the relationship by William E. Shenk and his wife in the deed to W. A. Williams, dispelled any doubt which could possibly have arisen out of the use of Shenk's initials in the partition judgment and made the relationship quite clear. Appellants purchased with notice. [Seilert v. McAnally, 223 Mo. l. c. 518; Higbee v. Bank, 244 Mo. l. c. 427.] The point has been decided several times. [Burton v. Compton, *supra*; Frazier v. Jeakins, *supra*; Fisher v. Bush, 133 Ind. l. c. 321; Bank v. Walkley, 169 Ala. l. c. 652.]

X. There is support in the record for respondent's contention that the sale was collusive and actually fraudulent, but the questions appellants present do not require further examination of that matter. Respondent complains the sum (\$5000) allowed appellant Williams for improvements is excessive and illegal. Respondent did not file a motion for new trial and did not appeal. The question is not presented for consideration. The judgment is affirmed. All concur except *Elder, J.*, not sitting.

W. A. ROHLF v. JOHN HAYES and KATE HAYES,
Appellants.

Division One, April 9, 1921.

SUIT TO QUIET TITLE: Pleading: General Denial: Defendant No Right to Complain of Judgment. In a suit under Sections 2535-2537, Revised Statutes 1909, to quiet title, where plaintiff, in his petition, claims title in fee and alleges that defendants "claim some right, title or interest" in the land described and defendants file an answer denying "each and every allegation" in plaintiff's petition, they have no right to complain of a judgment for plaintiff.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn, Judge.*

AFFIRMED.

Jos. S. Brooks for appellants.

Where plaintiff in his suit to quiet title tenders the issue of fee simple title, by alleging that he is the owner thereof, he must show a complete title from the patent, or must show a common source of title. The plaintiff made no prima-facie case and the demurrer to the evidence should have been sustained, and judgment should have been for defendants. *Stewart v. Land Co.*, 200 Mo. 281; *Toler v. Edwards*, 249 Mo. 162; *Noble v. Cates*, 230 Mo. 189.

A. I. Beach and *Bert Steeper* for respondent.

The defendants having denied in their answer that they claim any right, title or interest in the property in question, the plaintiff was entitled to a judgment on the pleadings, and since defendants claimed nothing, they cannot be hurt by a judgment for the plaintiff. *Gilchrist v. Bryant*, 213 Mo. 442; *Graton v. Land & Lumber Co.*, 189 Mo. 322; *Jordan v. Stevens*, 55 Mo. 361; *Stark v. Cooper*, 217 S. W. 104.

GRAVES, J.—The petition is an ordinary one to quiet title, under the statute, to a portion of Lot 8 of Harrison Boulevard Place, an addition to Kansas City, Missouri. Plaintiffs claim a fee simple title in the petition, and avers that defendants “claim some right, title or interest” in this portion of said lot.

Defendants’ answer reads thus:

“Now come the defendants and for answer to the plaintiff’s petition deny each and every allegation therein contained.”

After hearing evidence upon the part of plaintiffs, the defendants demurred thereto, and stood upon their demurrer. The court entered judgment for plaintiffs, and defendants have appealed. They challenge here the sufficiency of the evidence to show fee simple title in plain-

tiff, and this in the face of their answer wherein they denied that they claimed any "right, title or interest" in the premises. This outlines the case.

The defendant has no complaint to make as to this judgment, so far as his brief goes in this court. Under Section 2535, Revised Statutes 1909, the statute under which plaintiff proceeded, it was incumbent upon plaintiff to allege in his petition (1) that he claimed some interest in the property, and (2) that defendants claimed some interest in the property. These two allegations are substantive and vital to a petition under this statute. Defendants in such action may choose their own course in the answer. The procedure is as under our civil code. [R. S. 1909, sec. 2536.] If defendants default, or appearing, admit the facts of the petition and consent to judgment, then costs must be taxed against plaintiffs. [R. S. 1909, sec. 2537.] In this case defendants did not default, nor did they consent to a judgment for plaintiff as per his petition. They answered, but only by the general denial set out in the statement. By this general denial they denied that they claimed any title or interest in the premises. With this denial of record, they passed out of the case below, and here, as parties having an interest in the subject-matter of the litigation. When they denied, as they did, that they claimed either title or interest in the property, it is hard to conceive their further interest in the case *nisi*, or here. In *Gilchrist v. Bryant*, 213 Mo. l. c. 444, LAMM, J., in a similar situation said:

"Furthermore, defendant does not claim title in his answer. By filing a general denial he denied that plaintiff claims title or was the owner in fee simple absolute, but he did not stop with that—mark, he also denied that he, himself, had any claim, title or interest in the land hostile to plaintiff. On such a pleading can defendant be much injured by a judgment in favor of plaintiff? Let the judgment be affirmed. It is so ordered."

So say we in this case. The judgment is accordingly affirmed. All concur.

Seellig v. M., K. & T. Ry. Co.

WILLIAM L. SEELIG, Appellant, v. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.**Division One, April 9, 1921.**

1. **INSTRUCTIONS: Duplications.** If instructions offered by opposing parties are counterparts of each other, it is not necessary to give both. If one be given it will sufficiently present the opposing theories of the case.
2. ———: **Railroad Consolidation: Assumption of Debt.** Where one corporation was merged into another by consolidation, the merged company transferring to the other all its property except its franchise to be a corporation and going entirely out of business, and the other assuming to pay all its debts, in an action against the surviving corporation to recover for services rendered in relation to the affairs of the merged corporation, if the only evidence of the value of the services covers the entire period, and nothing shows separately the value of those rendered before the consolidation, there is no basis for an instruction authorizing recovery; the assumptions of debt did not cover the after-rendered services.
3. ———: **Nominal Damages.** Where there is no evidence from which the value of services for which suit is brought can be estimated, the plaintiff is not entitled to recover more than nominal damages.
4. **NOMINAL DAMAGES: Definition.** By nominal damages is meant those awarded where, from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show; or, differently expressed, a trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained.
5. **EVIDENCE: Relevancy.** It is not error to exclude evidence which is not relevant to the issues in the case.
6. ———: **Colloquy.** Where the matter excluded consisted partly of testimony but mainly of colloquy between counsel, the court and the witness, looking toward an adjournment of the case in order to enable the witness, offered as an expert, to inspect certain books and give an opinion based on such inspection, the matter was not responsive to any question, and it was not error to exclude it.
7. **CONTINUANCE.** The granting and refusing of continuances is largely a matter of the discretion of the trial court, and unless a clear abuse of its discretion is shown its action will not be interfered with.
8. **HYPOTHETICAL QUESTION: All Material Facts.** A hypothetical question which does not embody substantially all the material facts relating to the subject upon which the opinion of the witness is sought is objectionable and should be excluded.

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9. **JUDICIAL KNOWLEDGE: Value of Services.** The employment of an auditor of a railroad construction company is not such a common thing, and the reasonable value of the services that may be performed by such an official is not so within the common knowledge of all men, that courts and juries may be presumed to know their value without proof.

Appeal from St. Louis City Circuit Court.—*Hon. William T. Jones*, Judge.

AFFIRMED.

Joseph H. Grand and *Fred H. Wulfin* for appellant.

J. W. Jamison for respondent.

ELDER, J.—This is an action for the recovery of the value of services rendered by plaintiff (appellant herein), as auditor of the Missouri Kansas & Oklahoma Railroad Company.

The petition alleges that on June 14, 1904, plaintiff was employed as auditor of the said company, entered upon his duties as such, and performed all of those duties up to June, 1912; that said railroad company agreed to pay plaintiff for the reasonable value of the services rendered by him as such auditor, and that the same were reasonably worth, in all, the sum of \$7500; that on the — day of —, 19—, defendant Missouri, Kansas & Texas Railway Company took possession of and now holds all of the assets of said Missouri, Kansas & Oklahoma Railroad Company, and that “said Missouri, Kansas & Texas Railway Company, at or about said date expressly assumed in writing, and agreed to pay all of the debts of said Missouri, Kansas & Oklahoma Railroad Company, including the debt due to plaintiff from said Missouri, Kansas & Oklahoma Railroad Company, as aforesaid.” Judgment is prayed for \$7500, with interest thereon at the rate of six per cent per annum from the — day of June, 1912. The suit originally was brought against the Missouri Kansas & Oklahoma Railroad Company and the defendant Missouri, Kansas & Texas Railway Company, but was later dismissed as to the former company.

The answer was a general denial.

Judgment was rendered for plaintiff for nominal damages of one cent. From this judgment, after an unsuccessful motion for a new trial, plaintiff took an appeal to the St. Louis Court of Appeals. For want of jurisdiction, owing to the amount involved, the St. Louis Court of Appeals ordered the case transferred to this court and it now comes on for review.

The following statements of fact, set forth in appellant's statement and brief, are admitted by respondent:

"The undisputed testimony shows that plaintiff on and prior to the 14th day of June, 1904, was and had been in the employ of the defendant, M., K. & T. Railway Company, as general auditor, and that on that day was appointed auditor of the M., K. & O. Railroad Company, said appointment being made by a Mr. Hedge, vice-president of that corporation.

"It also stands undisputed that the M., K. & O. Railroad Company was a construction company whose officers and directors were also officers and directors of the defendant, M., K. & T. Railway Company; that on the 30th day of June, 1904, a preliminary deed was made, and subsequently on November 3, 1904, a final deed was made by the M., K. & O. Railroad Company, said deed conveying all of its property and assets and all of its rights, privileges and franchises, excepting the right and franchise to be a corporation, to the defendant company for the consideration of \$1 and the payment by the defendant of all 'debts, demands, claims and liens' of the M., K. & O. Company, which the defendant assumed and agreed to pay, satisfy and discharge."

Plaintiff did not personally appear or testify at the trial of the case, but his deposition was read in evidence. His testimony was that he entered the service of the defendant Missouri, Kansas & Texas Railway Company in 1892, and remained with that company, serving in several capacities, until October, 1912; that during about the last eight years he was auditor of the company, his salary being \$7500 per annum; that immediately upon his appointment as auditor of the Missouri, Kansas &

Oklahoma Railroad Company, on June 14, 1904, he "took charge of all of the books of the corporation, entered negotiations with contractors, inventoried the property, made collections of accounts, and settlements, auditing also all of the files of record, for the reason that the business of the company was involved;" that the nature of services rendered by him was "the work of an expert, going over the work for a period of two years, and to conclude the construction accounting and to liquidate the construction company;" that "the services were concluded in 1912, at which time I was advised that no further effort should be made to collect the bonus notes, as they were not considered worthy of further attention, under the conditions which had been indicated by the efforts to collect each of the notes;" that the service was continuous, "requiring much additional work at nighttime and outside of regular duties which I performed for the Missouri, Kansas & Texas Railway Company;" that during all the time the books and accounts were "kept in the office of the Missouri, Kansas & Texas Railway Company," but were kept separately; that some of the records were involved and required a great deal of time to decipher as they "were kept without regard to an experienced system of accounting;" that he had frequent conferences with the officers of the defendant company in reference to the accounts. Upon being asked to state "the fair and reasonable value of the services that you performed as auditor of the Missouri, Kansas & Oklahoma Railroad Company," plaintiff replied, "The most conservative estimate that I have is \$7500."

On cross-examination plaintiff testified:

"Q. You know, do you not, that after the completion of these conveyances, all of the property of the Missouri Kansas & Oklahoma Railroad Co. was turned over to the Missouri, Kansas & Texas Railroad Company? A. Well, it conveyed its property, yes.

"Q. And all property, of every kind, and franchises, of the Missouri, Kansas & Oklahoma, was conveyed to the Missouri, Kansas & Texas Company? A. There was the conveyance, yes. . . .

"Q. And you left the service of the Missouri, Kansas & Texas Railroad Company in June, 1912? A. Yes, actually it was October 1st, 1912.

"Q. Who was the comptroller of the company at that time? A. Mr. Geo. T. Cutts.

"Q. How long had he been there? A. About a year.

"Q. Did you ever present him with a claim or an account for your services? A. He was not interested in that.

"Q. Ask any other officer or agent of the company prior to the time of the institution of this suit? A. Yes sir, I filed a claim for services, by correspondence.

"Q. With whom did you correspond? A. General Solicitor, Mr. J. M. Bryson.

"Q. When? A. In 1912.

"Q. Did you write to Mr. Bryson? A. Yes, about the claim.

"Q. What reply did you get? A. I don't remember now.

"Q. Did you receive any letter from Mr. Bryson? A. I might have received an acknowledgment.

"Q. Did you correspond with anybody else in connection with the railroad at any time about this claim, make any claim to anybody else prior to your correspondence with Mr. Bryson? A. I don't remember.

"Q. When was it you took up this correspondence with Mr. Bryson, after you severed your connection with the company? A. Yes, sir." During the course of the trial the court sustained objections by counsel for defendant to the following testimony contained in the deposition of plaintiff:

"Q. Will you give, in order, the services, fixing the amount of work that you did in connection with the audit of the accounts of the company; will you give a general estimate of that work? A. The Missouri, Kansas and Oklahoma Railroad Company, which is the combination of the Texas and Oklahoma Railroad, being a line from Oklahoma City to Colgate, of 117 miles and a

fraction, and the Missouri, Kansas and Oklahoma Railroad, was bonded for \$5,468,000, and the Texas and Oklahoma for \$2,347,000, and a first mortgage extension of \$337,000, and a total mortgage of \$8,152,000—and capital stock of \$7,200,000, total capitalization of \$15,352,000. The bonds were issued in units, covering ten miles of railroad, and were guaranteed by the Missouri, Kansas and Texas Railway Company.

“MR. JAMISON: Objected to as stating a conclusion of witness.

“Q. Go ahead. A. The extension mortgage bond covering the lease of the line, instead of construction, from Atocka, to Colgate, a total of 13.6 miles. These bonds were exchanged for the first and refunding mortgage bonds of the Missouri, Kansas and Texas Railway Company, in the amount of \$421,000, and the proceeds retained by the officers and directors of the Missouri, Kansas and Oklahoma Railroad Company, for services. The capital stock of \$7,200,000 was exchanged for common stock of the Missouri, Kansas and Texas Railway Company, and \$2,200,000 retained by the officers and directors for services; \$5,000,000 was sold to the Southwestern Development Company at 15. The Southwestern Development Company was the successor to the Southwestern Coal & Improvement Company, which had a capitalization of \$2,800,000, all owned by the Missouri, Kansas & Texas Railway Company, and carried on its books at a value of \$280,000. No dividends had been received until 1903, when a four per cent dividend of \$11,200 was received by the Missouri, Kansas & Texas Railway Company from its mining operations. In 1903 the Southwestern Coal & Mining Company was reorganized and known as the Southwestern Development Company, and capitalized at \$1,000,000, 53.37% of the stock being taken by the officers and directors of the Missouri, Kansas & Texas Railway Company, as compensation, the Missouri, Kansas & Texas Railway Company receiving 46.67% of the million dollar capitalization. In the early part of 1903 the construction of the

Missouri, Kansas & Oklahoma Railroad, and the Texas & Oklahoma Railroad was contemplated, and the Southwestern Development Company borrowed \$200,000 from the Missouri, Kansas & Texas Railway Company, which was later repaid.

"MR. JAMISON: Objected to, as it does not show any attempt, or employment if any.

"A. The Missouri, Kansas & Texas Railway agreed to accept the line as constructed, in ten-mile sections.

"MR. JAMISON: Objected to for the reason that it is a conclusion of the witness—was that agreement in writing?

"A. I don't know as to that. The books that I audited would show.

"Q. The books that you audited would show the entire transaction? A. Yes, sir.

"Q. Go ahead. A. These bonds were issued at ninety, and the cost of construction and improvement limited to the sale of the bonds to the Southwestern Development Company at ninety. The Southwestern Development Company sold these bonds at an average of 110, making a net profit to the Southwestern Development Company of \$1,563,000, of which amount the officers and directors received 53.34%.

Q. Which company do you mean? A. The officers and directors of the Missouri, Kansas & Oklahoma Railroad Company, who were the same officers and directors as of the Missouri, Kansas & Texas Railway Company. The \$5,000,000 of common stock of the Missouri, Kansas & Texas Railway Company was sold to the Southwestern Development Company at 15.

"Q. At \$15 per share? A. Yes, sir—the Missouri, Kansas & Texas Railway Company receiving from the Southwestern Development Company \$750,000 therefor. This stock was later sold at an average of 40, a market having been made, thus a net profit made of about \$1,250,000, of which the officers and directors received 53.34%.

“Q. What officers do you mean? A. The officers and directors of the Missouri, Kansas & Oklahoma Railroad Company, who were the same officers as the officers and directors of the Missouri, Kansas & Texas Railway Company, all the way through. The \$2,200,000 of stock was sold by the officers and directors of the Missouri, Kansas & Texas Railway Company, about that time. The Missouri, Kansas & Oklahoma Railroad and the Texas & Oklahoma Railway were built through virgin country, and town sites and rights of way and privileges and free rights of way were considerations. No portion of the proceeds of bonuses, or town site propositions, were used in the construction of the Texas & Oklahoma Railroad, or the Missouri, Kansas & Oklahoma Railway, but all of which were received by the officers and directors of the Missouri, Kansas & Oklahoma Railroad, and the Texas & Oklahoma Railway, who were the same as the officers and directors of the Missouri, Kansas & Texas Railway. The balance of the bonus notes, of which there were a great many, were turned over by the construction company to the Missouri, Kansas & Texas Railway Company, at the final completion; and thereafter, all matters pertaining to the collections were made for account of the Missouri, Kansas & Oklahoma Railroad, which extended up to a number of years. There were many notes which were contested, by reason of the failure to carry out obligations on the part of the railway. The Southwestern Development Company finally liquidated in 1906, and the Missouri, Kansas & Texas Railway Company paid for the mining rights, etc., \$187,000 which they originally owned—in order that the Southwestern Development Company might pay a 100% dividend.

“Q. Cash dividend you mean? A. Yes, dividend on the stock, when it was finally liquidated. The president of the Southwestern Development Company was a clerk of the office of the president of the Missouri, Kansas & Texas Railway Company.

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"Q. What was his name? A. I cannot recollect his name.

"Q. Whose office? A. The office was located at 49 Wall Street."

Harry G. Ambrose, a certified public accountant, testified for plaintiff that "around 15 or 20 years ago" he had had experience in auditing accounts of a construction company constructing a railroad and was familiar with that class of accounts. Being present in court and having heard the deposition of plaintiff read the witness was asked: "From what you heard read there, can you in your mind, approximate anything like the amount of time that is necessary to do that work?" He answered, "I think so." On being interrogated further, witness was asked: "Would you say from what you heard here, that he put in one or two hours a day?" Witness replied: "Assuming he put in one or two hours a day, the reasonable value would be a certain amount."

THE COURT: "That is the trouble, he is assuming something of which we have no evidence. I think I will have to sustain the objection."

The following further questions aimed to elicit an opinion as to the reasonable value of the services performed by plaintiff were excluded by the court:

"MR. GARESCHE: Mr. Ambrose, it may take you a little time and it may take a little of the court's and the jury's time, but I will ask you to examine these records here? Just go over then and tell the court and jury approximately how much time it would take to audit these accounts here as they appear in these books (Handing books to witness).

"MR. JAMISON: I want to object, your Honor.

"THE COURT: Let's see if he can, first.

"MR. JAMISON: I went to make the objection to begin with, that not a single line or mark in these books was made by Mr. Seelig, and there is no entry in these books showing any transaction after the date of the transfer by this deed that has been read in evidence, to the Missouri, Kansas & Texas Railway Company, and therefore, they don't show any work performed by Mr. Seelig.

"MR. GARESCHÉ: Counsel overlooks the fact that Mr. Seelig was not simply a bookkeeper, but he was an auditor, and the duties of an auditor, nobody knows better than counsel himself, do not consist of writing 'two and two are four,' but it consists, as a rule, in going over the accounts which have been kept by some one else, and determining every inaccuracy. Now, the witness Seelig did say he did this work; that he went over them all.

"THE COURT: Well, let me ask the witness.

"THE COURT: You heard the deposition of Mr. Seelig in reference to these books, that he made no entries in these books?

"THE WITNESS: I did.

"THE COURT: Now, can you, by looking through these books this way, form any definite idea as to the amount of work that Mr. Seelig, as an auditor, was required to do?

"THE WITNESS: I believe I could, if sufficient time were had; I frequently examine books, with a view of furnishing an estimate as to the time used, and we can in that way arrive at an estimate of the cost.

"THE COURT: How is that?

"THE WITNESS: I say, I frequently examine books with a view of furnishing the cost of the work, but that can't be done in a few minutes. We may spend several hours; we may spend half a day or a day, according to the size of the proposition, but I would have to have time to look at these books to make any estimate of time it would require to audit them.

"MR. GARESCHÉ: Do you think, between now and to-morrow morning at ten o'clock, you could look over these books and tell just how much time Mr. Seelig used in auditing these books? A. I believe I could, if you gave me sufficient time.

"THE COURT: Well, he said between now and to-morrow morning.

"MR. GARESCHÉ: You may have the time between now and to-morrow morning at ten o'clock, with the court's consent.

"MR. JAMISON: I certainly, your Honor, object to that. Yesterday morning, you had this case adjourned over until to-day.

"MR. GARESCHE: Not a record was in court yesterday morning.

"MR. JAMISON: The records were here.

"MR. GARESCHE: Not a record was in this court yesterday morning. They were brought in to-day.

"MR. JAMISON: They have been ready and available.

"MR. GARESCHE: I asked you to let me inspect them not over ten days ago.

"MR. JAMISON: There is not a mark in that man's handwriting in these books to show he ever had then in his hands, and he can't look at them now, and by some sort of semi-subconscious method of procedure—

"MR. GARESCHE: I object to the statement of counsel before the jury. It is apparently intended to prejudice the rights of the plaintiff before this jury, and is plainly intended to minimize the importance of the witness before this jury. I ask, your Honor, in view of the witness's last answer, that the hearing of this case be adjourned until to-morrow morning at ten o'clock, inasmuch as Brother Jamison puts us to that trouble, in order that this witness may examine these accounts.

"MR. JAMISON: I object to the adjournment, your Honor.

"THE COURT: The objection will have to be sustained." . . .

"MR. GARESCHE: Now, Mr. Ambrose, don't answer promptly, because Mr. Jamison will want to object to this next answer, too, I suppose. Assuming that it was a line of railroad, say 237 miles in length, under construction, what would you say would be the fair and reasonable value of the services of an auditor or expert public accountant in auditing the accounts of that railroad, or that corporation building that line of railroad, per annum?

"MR. JAMISON: I object to that, as it is a hypothetical question that is not based on this case. It de-

pend upon how many contractors and sub-contractors there are, and innumerable other conditions that would be impossible to mention or even to conceive of. It don't pretend to show what was done in this case."

For defendant, Charles S. Burg, commerce counsel of the Missouri, Kansas & Texas Railway Company, testified that in 1904 he was chief clerk of the law department under Mr. Hagerman and Mr. Bryson, general and assistant general counsel, respectively; that he was acquainted with plaintiff who, at that time, was general auditor for the defendant company; that R. W. Maguire, the comptroller of the company, was plaintiff's superior; that the collection of all bonus notes that were transferred by the M., K. & O. to the M., K. & T. in 1904 had been handled by the law department; that they were turned over to the law department by Mr. Maguire, comptroller of the M., K. & T. Railway Company, to be collected; that the notes remained in the law department for several years; that suits were instituted on some of the notes and compromises effected on others; that all correspondence concerning the notes was handled by the witness and Mr. Bryson; that as far as he knew, plaintiff never consulted the law department with reference to the notes; and that the correspondence of the law department concerning the bonus notes and their collection was with comptroller Maguire.

W. H. Brown, a witness for defendant, testified that in 1904 he was stenographer for both plaintiff and Maguire, auditor and comptroller, respectively, of the Missouri, Kansas & Texas Railway Company; that he saw the books of the M., K. & O. Railroad Company in the office; that he could not recollect writing any letters for plaintiff with reference to the M., K. & O. Railroad Company's bonus notes; that Maguire dictated all letters and attended to the business of that company; that he saw the books of the M., K. & O. in the hands of plaintiff only once and on that occasion Maguire and Seelig were looking over the books; that he often worked nights and Sundays between December, 1904, and July, 1906, and never

saw Mr. Seelig working on any books when he was there; that there were two sets of books, one labeled M. K. & T., and the other M. K. & O. On redirect examination witness stated that, as far as he knew, plaintiff dictated no letters with reference to bonus notes.

Charles Nelson Whitehead, testifying as a witness for defendant, stated that he had been associated with the defendant for a period of twenty-five years; that he started in Dallas, Texas, as a messenger in a local yard office and was promoted to higher positions until he became vice-president, and at this time assistant to the receiver; that in 1904, he was in the office of the general counsel in St. Louis; that he knew plaintiff well; that he was quite familiar with the transaction through which the M., K. & T. Railway Company acquired the property of the M., K. & O. R. R. Company, which transaction took place in the office of the general counsel, and that he went to New York in 1905 to take charge of all the books and records pertaining to the transaction; that some of the books of the M., K. & O. were in New York and some in St. Louis; that Mr. Maguire was appointed comptroller of the M., K. & O. at the same time that plaintiff was appointed auditor and that he continued his services as such until 1909 or 1910; that the Missouri, Kansas & Oklahoma Railroad Company "went out of existence after the time of its consolidation;" that it "never transacted any business of any kind; paid no taxes or never performed any functions of an active company from the time of its sale to the M., K. & T. on June 30th, 1904. It still has a charter, and so far as any officers of the company are concerned, they have never resigned and they are still officers of that company if there be one." In 1904, witness stated, the M., K. & O. sold its property to the M., K. & T., the consideration for the sale was that the M., K. & T. would assume all outstanding bonds of the M., K. & O., would pay all of its outstanding liabilities and take all of its assets; that the liabilities were practically all paid at the time and the assets practically all col-

lected except a few outstanding bonus notes and probably a few construction accounts in which there were about forty or fifty thousand dollars involved. Witness stated that on June 30, 1904, all the assets and liabilities of the M., K. & O. became the assets and liabilities of the M., K. & T.; that the M., K. & O. only constructed but never operated a railroad and that after June 30, 1904, the property of the M., K. & O. from an operating and business standpoint was handled as the property of the M., K. & T. by the officers of the latter company, and that Mr. Maguire never demanded nor received compensation for work done in bringing over the assets of the M., K. & O. business. Witness stated that no one connected with the auditing department, comptroller's department, treasurer's and operating department ever received extra compensation for services rendered in connection with taking over the M., K. & O. and that no one except plaintiff ever demanded extra compensation, and that plaintiff made his demand after he was discharged. On cross-examination witness stated that there was no company operating under the charter of the M., K. & O. R. R. after October, 1904; that he did not know whether the M., K. & O. officers had any meetings after that date, but if there were meetings there were no minutes of them; that he did not know when the books of the M., K. & O. were finally closed and did not know what work plaintiff did on the books, but that if he did any, it was for the M., K. & T.; that plaintiff was not discharged as auditor of the M. & K. O., because that company was considered out of existence after June 30, 1904; and that no officer received compensation for services to the M., K & O after June 30, 1904. On recross-examination witness stated that he did not examine the records, but that it was never brought to his attention that any officer demanded or received extra pay for services to the M., K. & O. after June 30, 1904. On second redirect examination, Mr. Whitehead further testified:

"Q. Mr. Whitehead, plaintiff's counsel just read there a question and answer by Mr. Seelig. His answer

was: 'The officers of the Missouri, Kansas & Texas Railway Company were also officers of the Missouri, Kansas & Oklahoma Railroad Company and received compensation as such.' Now, it is true, as I understand, that at the time and during this work of construction, some of the officers were the same; is that right? A. Yes, sir.

"Q. And while they occupied those positions and were in the active work of both companies, they did get salaries, some of them? A. Yes, sir.

"Q. State whether or not that was continued or was abandoned after June, when this consolidation took place. A. That was abandoned in June, the date of the deed."

E. F. Broomhall, testifying as a witness for defendant, stated that he was a resident of Parsons, Kansas, was connected with the Missouri, Kansas & Texas for about twelve and a half years, and that between 1907 and 1910 he was the general bookkeeper of the company in St. Louis, and knew plaintiff; that he had no knowledge of the Missouri, Kansas & Oklahoma books, but that he kept all of the books of the Missouri, Kansas & Texas and prepared and superintended all of the entries on the books of the company on the Missouri, Kansas & Texas Railway Company's books; that he brought the books that were introduced as the Missouri, Kansas & Oklahoma records and that the books had been in the custody of the Missouri, Kansas & Texas in the Railway Exchange Building and had been shipped there from his office in Parsons, where all the records of the company were stored; that he knew the handwriting of the plaintiff and that there was not a figure in the records that he could recognize as plaintiff's handwriting. On redirect examination he stated that the books produced, taken as a whole, were complete from a bookkeeping standpoint and kept in the usual and ordinary way; that the books and vouchers were brought because plaintiff through his counsel requested that they be produced. On recross-examination witness stated that the accounts in

the books were shown only to November, 1904, and did not know where the accounts after that date were and never heard of them. On second re-direct examination witness stated that if there were any accounts of the M., K. & O. kept after November, 1904, they were kept by the M., K. & T. Ry. Co. On recross-examination Mr. Broomhall stated that he did not of his own knowledge know what accounts were kept by the M., K. & O.

In rebuttal, a portion of plaintiff's deposition was read wherein plaintiff testified that "the officers of the Missouri, Kansas & Texas Railway Company were also officers of the Missouri, Kansas & Oklahoma Railroad Company, and received compensation as such."

The foregoing was substantially all the evidence in the case.

At the close of all the testimony, the court, at the request of defendant, gave the following instructions:

"2. If the jury find from the evidence that the services, if any, rendered by plaintiff in connection with the books, records or business of the Missouri, Kansas and Oklahoma Railway Company were performed by him as an employee of the Missouri, Kansas and Texas Railway Company and as a part of his duties as such employee then your verdict will be for defendant.

"3. The jury are instructed that if you find the issues for plaintiff you cannot under the law and the evidence allow him any sum in excess of what you may find from the evidence was the reasonable value of his services as auditor of the Missouri, Kansas and Oklahoma Railroad Company from the 14th day of June, 1904, to the 3rd day of November, 1904, and if under the evidence you are unable to determine the value of such services your verdict, if you find for the plaintiff, will be for nominal damages only or one cent."

On its own motion, the court gave the following instruction:

"4. The court instructs the jury that if you find and believe from the evidence that on or about the 14th day of June, 1904, the plaintiff was appointed auditor

of the Missouri, Kansas and Oklahoma Railroad Company, and that thereafter he rendered services and performed duties as such, then the plaintiff had, on November 3, 1904, a claim against said Missouri, Kansas and Oklahoma Railroad Company, for the reasonable value of the services so performed by him (if any), unless you further find that in the circumstances under which said appointment was made and said services (if any) were rendered, the plaintiff understood and knew that he was not expected to make any separate charge for his services so rendered (if any), and understood and knew that the Missouri, Kansas and Oklahoma Railroad Company did not expect to pay him for any services so rendered (if any).

"If you find, under the foregoing paragraph of this instruction, that the plaintiff had a claim against the Missouri, Kansas & Oklahoma Railroad Company on November 3, 1904, for services rendered by him as auditor of that company, and if you further find that on on said 3rd day of November, 1904, the said Missouri, Kansas & Oklahoma Railroad Company transferred and assigned all of its assets and properties, franchise, etc., to the defendant, M., K. & T. Ry. Co., and that as part of the consideration for said transfer, the M., K. & T. Ry. Co. assumed and agreed to pay all of the debts and claims of the said Missouri, Kansas & Oklahoma Railway Company, then you will find your verdict for the plaintiff and against the defendant Missouri, Kansas and Texas Railway Company for such sum as you may believe and find from the evidence is the reasonable value of the services performed by the plaintiff (if any) as auditor of the said Missouri, Kansas & Oklahoma Railroad Company, between the 14th day of June, 1904, and the 3rd day of November, 1904."

The court refused to give plaintiff's requested instruction as follows:

"1. The court instructs the jury that if you believe and find from the evidence that heretofore to-wit, on or about the — day of June, 1904, plaintiff was employed

by defendant Missouri, Kansas & Oklahoma Railroad Company as auditor and that thereafter and up to and inclusive of the — day of June, 1912, plaintiff performed all the duties as auditor of said defendant, and if you further believe and find that defendant Missouri, Kansas & Texas Railway Company had conveyed to it all of the property of the defendant Missouri, Kansas & Oklahoma Railroad Company, and in and by the deed of conveyance defendant Missouri, Kansas & Texas Railway Company in consideration of said conveyance assumed and agreed to pay all the claims and contracts of defendant Missouri, Kansas & Oklahoma Railroad Company, then your verdict will be in favor of plaintiff and against the defendant Missouri, Kansas & Texas Railway Company for such sum as you may believe and find from the evidence was and is the reasonable value of the services as auditor, if any, performed by plaintiff for the benefit and account and in behalf of defendant Missouri, Kansas & Oklahoma Railroad Company.”

I. Learned counsel for plaintiff contend that, Instruction No. 2, having been given at the request of defendant, the court erred in refusing to give Instruction No. 1, requested by plaintiff, which counsel say is “the very counterpart” of number 2. To sustain such contention counsel argue that the entire theory of the case; as made by defendant, was submitted to the jury by Instruction No. 2, and that Instruction No. 1, covering plaintiff’s theory of the case, should not have been excluded from the consideration of the jury. If, as is stated, Instruction No. 1 is the “counterpart” of No. 2, then plaintiff was not prejudiced by the action of the court in refusing to give Instruction No. 1 (which according to counsel corresponded to or was a duplicate of Instruction No. 2), as Instruction No. 2 was given and was before the jury, thereby giving plaintiff the benefit of the jury’s consideration thereof.

But we are not confined to upholding the refusal of Instruction No. 1 upon that ground. Plaintiff predicat-

ed his case upon the final deed from the Missouri, Kansas & Oklahoma Railroad Company to defendant Missouri, Kansas & Texas Railway Company, dated November 3, 1904, whereby said defendant assumed and agreed to pay all debts, demands, claims and liens of the said Missouri, Kansas & Oklahoma Railroad Company. The evidence showed that the Missouri, Kansas & Oklahoma Railroad Company transacted no business of any kind and performed no functions as an active company after June 30, 1904; that after that date the property of that company, "from an operating and business standpoint was handled as the property of the Missouri, Kansas & Texas Railway Company, by the officers of the latter company," who were also officers of the Missouri, Kansas & Oklahoma Railroad Company; that all the books and records of said Missouri, Kansas & Oklahoma Railroad Company were delivered into the custody of the defendant Missouri, Kansas & Texas Railway Company; that the accounts in the books of the Missouri, Kansas & Oklahoma Railroad Company "were shown only to November, 1904;" and that "if there were any accounts of the Missouri, Kansas & Oklahoma Railroad Company, kept after November 1904, they were kept by the Missouri, Kansas & Texas Railway Company." Plaintiff, in addition to being auditor of the Missouri, Kansas & Oklahoma Railroad Company was also auditor of defendant Missouri, Kansas & Texas Railway Company, at a salary of \$7500 per annum. He testified that he began auditing the books and accounts of the Missouri, Kansas & Oklahoma Railroad Company immediately after his appointment as auditor of that company on June 14, 1904, and concluded the services in June, 1912; that he kept the accounts and books in the office of the Missouri, Kansas & Texas Railway Company, sometimes at night, and "outside of regular duties which I performed for the Missouri, Kansas & Texas Railway Company." He sued on the theory that the Missouri, Kansas & Oklahoma Railroad Company was indebted to him for services rendered between June 14, 1904, and

June, 1912, which indebtedness he claims the defendant Missouri, Kansas and Texas Railway Company assumed and agreed to pay. He introduced no evidence as to the value of the services rendered by him between June 14, 1904 and November 3, 1904, upon which latter day the Missouri, Kansas & Oklahoma Railroad Company conveyed all of its property to the defendant Missouri, Kansas & Texas Railway Company. Clearly, compensation for services rendered subsequent to November 3, 1904, constituted an indebtedness which accrued *after* the execution of the conveyance upon which he relies. The court of its own motion, gave Instruction No. 4, which, when supplemented by Instructions No. 2 and No. 3, in our opinion embraces all of the issues presented by the pleadings and the evidence in the case. With the exception of submitting the question of the value of services rendered by plaintiff after November 3, 1904, which the evidence did not warrant, Instruction No. 4 covers every phase of the case contemplated by plaintiff's Instruction No. 1, and adheres to plaintiff's theory of the case.

We therefore hold that no error was committed in refusing Instruction No. 1. [State ex rel. Robertson v. Hope, 102 Mo. 410; Meadows v. Life Ins. Co., 129 Mo. 76; Bank v. Hatch, 98 Mo. 376; Anderson v. Railway Co., 161 Mo. 411.]

II. Plaintiff next contends that Instruction No. 3, given for defendant, was "ambiguous and confused the jurors," and counsel argue that it practically told the jury to find for one cent. To this we cannot give assent. The language used is clear and concise and in no way equivocal. The rule here applicable is, that where there is no evidence from which the value of the services can be estimated, plaintiff is not entitled to recover more than nominal damages. [Woodward v. Donnell, 146 Mo. App. 119; Owen v. O'Reilly, 20 Mo. 603; Cravens v. Hunter, 87 Mo. App. 456; Weber v. Squier, 51 Mo. App. 601; Brown v. Emerson, 18 Mo. 103; King v. St. Louis, 250 Mo. l. c. 513.] And

Nominal
Damages.

the state of proof as to the reasonable value of the services of plaintiff as auditor of the Missouri, Kansas & Oklahoma Railroad Company from June 14, 1904, to November 3, 1904, being such that the jury could not with any approximate correctness calculate the same defendant was entitled to have incorporated in the instruction a limitation to nominal damages. [King v. St. Louis, *supra*; Sang v. St. Louis, 262 Mo. l. c. 463.] And by nominal damages, as here obtains, is meant, "those awarded where from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show," or, differently expressed, "a trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained." [Bouvier's Law Dictionary, Nominal Damages.] Nor did the court err in referring to the nominal damages to be recovered as "one cent." [Segelke v. Finan, 1 N. Y. Supp. 381; Bennum v. Coursey, 76 Atl. 53; Ransone v. Christian, 56 Ga. 351.] We therefore rule the point against plaintiff.

III. (a) Plaintiff maintains that the court improperly excluded that portion of the deposition of plaintiff which began with the question, "Will you give, in order, the services, fixing the amount of work that you did in connection with the audit of the accounts

Evidence. of the company; will you give a general estimate of that work?" A review of the answer to this and the succeeding questions which were excluded leads us to conclude that this contention is unfounded. The trial court, in sustaining the objection of defendant thereto, ruled that "there is some matter that might be admissible, but it is so intermingled with matter that has nothing to do with the issues in here, that I don't see how it can be separated." And so think we, except that we are of the opinion that none of the matter was pertinent to the real questions in the case. The testimony given is a lengthy, involved and abstract statement relating to the bonded indebtedness, the capital stock, and the financing

of the Missouri, Kansas & Oklahoma Railroad Company, and was not material or relevant to the issues. We rule the point against plaintiff.

(b) Plaintiff also asserts that the court committed error in excluding that testimony of witness Ambrose, the certified public accountant, aimed to bring out an opinion as to the reasonable value of the services performed by plaintiff. A review of this evidence shows that in the main it was a colloquy between counsel for plaintiff and for defendant and between the court and the witness, looking towards an adjournment of the case in order to allow the witness time to inspect the books of the Missouri, Kansas & Oklahoma Railroad Company offered in evidence. The witness stated, in substance, that if given sufficient time to examine the books he could form an estimate as to the time required to audit the same and in that way arrive at an estimate of the cost of the work. On the whole the testimony was not responsive to the inquiry, proved no pertinent fact in the case and in our opinion no harm resulted from the exclusion thereof. The hypothetical question asked was objectionable, and properly excluded, for the reason that it did not embody substantially all the material facts relating to the subject on which the judgment of the witness was sought. [Mammerberg v. Street Ry. Co., 62 Mo. App. 563; Ridenour v. Mines Co., 164 Mo. App. 576; Quinley v. Traction Co., 180 Mo. App. 287.] Accordingly we also rule this point against plaintiff.

IV. Plaintiff further insists that it was an abuse of discretion on the part of the trial court to refuse a continuance or adjournment of the case until the next day, so that the witness Ambrose might examine the accounts appearing in the books of the Missouri, Kansas & Oklahoma Railroad Company. The record tends to show that the books were in court during the day of the trial, available to plaintiff, and it would seem that plaintiff's witness, who the record discloses was present in court before being put upon the witness stand, could probably have made some inspec-

Continuance.

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tion thereof previous to testifying. At any rate it is the rule that the granting and refusing of a continuance is largely within the discretion of the trial court, and unless a clear abuse of such discretion is shown, the action of the court will not be disturbed. [Pidgeon v. United Rys. Co., 154 Mo. App. 20; Rhodes v. Guhman, 156 Mo. App. 344; Gregory v. Hansen, 224 S. W. 82; Lackey v. Lubke, 36 Mo. l. c. 120.]

We hold that in the instant case there was no such abuse of discretion.

V. Plaintiff finally contends that the verdict is grossly inadequate. By Instruction No. 4 the jury were instructed that if they found for plaintiff they should find
Inadequate Verdict. “for such sum as you may believe and find from the evidence is the reasonable value of the services performed by the plaintiff (if any) as auditor of the Missouri, Kansas & Oklahoma Railroad Company, between the 14th day of June, 1904, and the 3rd day of November, 1904.” By Instruction No. 3, the jury were told that “if under the evidence you are unable to determine the value of such services” (rendered between June 14, 1904, and November 3, 1904), “your verdict, if you find for the plaintiff, will be for nominal damages only or one cent.” Under all the evidence in the case there was no showing whatsoever as to the value of the services rendered during the period of time mentioned—about four and one-half months. Having no basis for computation before them, the jury were justified, under the instructions given, which instructions were in turn warranted by the evidence, in returning a verdict for nominal damages only. [Woodward v. Donnell, 146 Mo. App. 119; Cravens v. Hunter, 87 Mo. App. 456; Zimmerman v. Produce Co., 192 S. W. 1038; Brown v. Asphalt Mfg. Co., 210 Mo. 260.]

Counsel for plaintiff argue that “since men generally know the character and nature of auditing work and the reasonable value of such services” the jury returned

a "grossly inadequate and unjust verdict." But, as was said by REYNOLDS, P. J., in *Woodward v. Donnell*, supra, at page 125, a case involving the value of services rendered by a dentist's assistant, "Certainly such employment is not so common or the value of such services so within the common knowledge of all men, that courts and juries are to be presumed to know that value without any proof thereof." And so in the case at bar, the reasonable value of such services as plaintiff performed is not a matter of such common knowledge that testimony upon the subject was unnecessary. We therefore hold against plaintiff on this point.

Respondent in its brief deals with but few of the errors assigned by plaintiff, but advances the argument that there was total failure of proof by plaintiff, that he cannot recover for extra work performed in the absence of an express contract therefor, and that the services performed by him were presumed to be paid for by his regular salary of \$7500 per annum. It is unnecessary for us to pass upon those phases of the case, other than as herein adverted to.

After a careful review of the record we find nothing to justify an interference with the judgment and it is accordingly affirmed. All concur.

FREDERICK MEFFERT STRIPE, A Minor, by
JAMES A. SHANNON, His Guardian, v. ANNA
MEFFERT, MARTIN E. LAWSON and SILVIA C.
BARRICK, Appellants.

Division One, April 9, 1921.

1. **TRIAL: Special Verdict: Incomplete Determination: Motion for New Trial.** Where there is a special verdict, leaving some of the issues to be determined, a motion for a new trial filed within four days after their determination, is timely filed.
2. **APPEAL: Trial de Novo in Supreme Court.** Where a case was treated in the trial court as an equity case with the acquiescence and consent of the plaintiff, he cannot object to its being so treated on appeal, and therefore this court will not be limited to

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consideration of questions of law, but may try the case *de novo* on the facts.

3. **ILLEGAL MARRIAGE: Divorce: Adultery: Legitimacy of Children.** Section 342, Revised Statutes 1909, provides that "the issue of all marriages decreed null in law or dissolved by divorce shall be legitimate." In order that a child may be legitimate within the meaning of this statute, there must have been not only a marriage between the parents, but such a marriage as would be decreed null in law or dissolved by divorce in a proceeding in equity between them. In an action to annul a marriage in equity, for any reason, or for divorce, if both parties knowingly lived in adultery, there would be no marriage to annul and neither would be an innocent or injured party; neither would come into court with clean hands, and no relief could be granted to either. Unless the marriage is entered into by one or both of the parents honestly, innocently and in good faith it is not such a marriage as is contemplated by this section.
4. **LEGITIMATION OF CHILDREN.** Section 341, Revised Statutes 1909, provides that "if a man, having by a woman a child or children, shall afterward intermarry with her and shall recognize such child or children to be his, they shall thereby be legitimated." This applies to cases where the relationship between the parties at the time the child was conceived was illegal and criminal as to both parents. In such case a subsequent legal marriage and recognition is necessary to legitimacy.
5. ———: **Adultery: Guilty Knowledge of Parties.** Where the evidence showed that both the parents were knowingly guilty of adultery, the child cannot be held legitimate under Section 342 at all, and not under Section 341 unless there has been a subsequent marriage between the parents accompanied by recognition by the father.
6. ———: ———: **Non-Access: Presumption.** In cases where the question is whether the paramour or husband of the mother is the father of the child, the non-access of the husband is required to be shown by clear and convincing proof; otherwise, the presumption is that the husband, and not the paramour, is the father.

Appeal from Jackson Circuit Court.—*Hon. Allen C. Southern*, Judge.

REVERSED.

Lathrop, Morrow, Fox & Moore and *George W. Day* for appellants.

(1) The case was tried in the court below as one in equity; all parties are bound by that theory. Har-

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wood v. Toms, 130 Mo. 225; Roselle v. Beckmeir, 134 Mo. 380. (2) The motion for new trial was filed in time. The cases which hold that the time for filing a motion for new trial should be reckoned from the date if the return of the verdict and not from the date of the judgment are cases in which the return of the verdict marked the close of the trial. (3) The judgment here can be sustained only upon a finding that there is in the record sufficient evidence showing there was a marriage between Dr. Joseph F. Meffert and Anna Marie Stripe, which the law deems null. R. S. 1909, sec. 342. (4) Unless at least one of the parties to an alleged common-law marriage enters it in good faith, believing the other party to it competent to contract marriage, the issue of the cohabitation of the parties is not legitimate. Green v. Green, 126 Mo. 17; Nelson v. Jones, 245 Mo. 579. (5) Both Dr. Meffert and Mrs. Stripe knew that Mrs. Stripe was the lawful wife of another, when they assumed the relation testified to by her. Good faith was, therefore, lacking in both of them; the relation was meretricious and not that of a marriage deemed null in law. (6) Every child born in wedlock is presumed to be legitimate. Proof to the contrary must show impossibility of access or of procreation by the husband. Johnson v. Johnson, 30 Mo. 72; Drake v. Hosp. Assn., 266 Mo. 1.

Gamble, Kennard & Trusty and Marley & Reed for respondent.

(1) This case came on in due course for trial, as a jury case, and although appellants insisted that it was an equity case not triable by a jury, and objected to a jury trial, the respondent was equally insistent that it was a jury case and insisted upon a trial to a jury. The court took the view of the respondent and tried the case as a jury case; and all action of the court after the return of the verdict by the jury was influenced and induced by the appellants and not by the respondent. Respondent

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desires to raise the point that as to him there is nothing but the record proper before this court for its consideration. Neither the petition nor any of the answers claim as to respondent, any equitable rights nor invokes the exercise of the powers of a chancellor. That in fact the petition and answers clearly show that the action was an action at law triable to a jury. *Kline v. Greeschner*, 219 S. W. 652; *Hays v. McLaughlin*, 217 S. W. 263; *Newbrough v. Moore*, 202 S. W. 549; *Hunter v. Moore*, 202 S. W. 545; *Koehler v. Rowland*, 275 Mo. 581, 205 S. W. 219; *Tracey v. Coppage*, 213 S. W. 38; *Dowd v. Bond*, 199 S. W. 954; *Bacon v. Theiss*, 208 S. W. 254; *Thompson v. Stillwell*, 253 Mo. 89; *Lee v. Conran*, 213 Mo. 404; *Wimpey v. Lawrence*, 208 S. W. 58; *Tolar v. Edwards*, 249 Mo. 158; *Minor v. Burton*, 228 Mo. 563; *Miller v. Lloyd*, 204 S. W. 258; *Brooks v. Gaffin*, 192 Mo. 228; *Hauser v. Murray*, 256 Mo. 84; *Minicum v. Solar*, 183 S. W. 1037; *Brook v. Roberts*, 195 S. W. 1021; *Coulson v. Le Plant*, 196 S. W. 1144; *Brandt v. Brents*, 177 S. W. 377; *McLarty v. Griggs*, 222 S. W. 391; *Brooks v. Roberts*, 220 S. W. 11; *St. Louis Union Trust Co. v. Hill*, 223 S. W. 435; *Mooneyham v. Wynatt*, 222 S. W. 451. (2) Sec. 342, R. S. 1909, should be liberally construed in favor of the child. The strict requirement being only as to its paternity. *Watt v. Owens*, 62 Wis. 512; *Blythe v. Byers*, 19 L. R. A. 40; *In re Shipp*, 168 Cal. 641; *Brown v. Legion of Honor*, 78 N. W. 73; *Morin v. Holiday*, 30 Ind. App. 201. Children are unconscious of the marriage and the criminality thereof does not affect them, nor is it to be considered when passing upon their claim to legitimacy. *Dyer v. Brannock*, 66 Mo. 404; *Brewer v. Bloucher*, 14 Pet. 178; *Stones v. Keeling*, 5 Call. (Va.) 143; *Heckert v. Hile*, 90 Va. 391; *Leonard v. Braswell*, 99 Ky. 528; *Wright v. Lore*, 12 Ohio St. 619; *Harris v. Harris*, 85 Ky. 49; *Hartwell v. Jackson*, 7 Tex. 579. The statute should be construed to carry out its humane purpose. *Turnmier v. Mayes*, 121 Tenn. 45; *In re Jessup*, 81 Cal. 408; *Christopher v. Munger*, 61 Fla. 513; *Lincecum v. Lincecum*, 3 Mo. 441; *Johnson v. Johnson*,

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30 Mo. 80; Buchanan v. Harvey, 35 Mo. 276; Nelson v. Jones, 245 Mo. 597; Evatt v. Miller, 114 Ark. 84; Mund v. Rebanme, 51 Colo. 134; Leonard v. Brasswell, 99 Ky. 533; Hutchins v. Kimmell, 31 Mich. 132; Morris v. Williams, 39 Ohio St. 557; Watts v. Owens, 62 Wis. 512. (3) The verdict marked the end of the trial, as it settled all the issues of fact and left the court no alternative except to enter judgment for plaintiff or grant a new trial; and defendant's failure to file such motion within four days after verdict means that the appeal brings nothing here for review except the record proper, and as to that no error is assigned. R. S. 1909, secs. 1988, 1989, 1990; Green v. Whaley, 271 Mo. 636; DeSoto v. Ins. Co., 102 Mo. App. 1; Hall v. Mullanphy, 16 Mo. App. 454; Cockrell v. McIntyre, 161 Mo. 59; Waddington v. Lane, 220 Mo. 387; Young v. Downey, 150 Mo. 317; City of St. Louis v. Boyce, 129 Mo. App. 443; Brubaker v. Brubaker, 74 Kan. 220, 86 Pac. 455; Spalding v. Mayhill, 27 Mo. 377; Shipp v. Snyder, 121 Mo. 155.

SMALL, C.—Suit to quiet title to real estate in Jackson and Clay Counties. Petition is in the conventional form, claiming that plaintiff owns the entire fee title in the property sued for. No equitable title alleged, nor equitable relief prayed for on face of petition.

The answer of defendant Anna Meffert was a general denial. The answer of defendant Lawson, besides a general denial, averred that neither plaintiff nor defendant Sylvia C. Barrick had any interest, but that said Lawson, as executor of the last will of Joseph F. Meffert, deceased, under said will, holds the entire fee-simple title for his co-defendant, Anna Meffert. Defendant Sylvia C. Barrick's answer was to the same purport as the answer of defendant Lawson.

After the jury was sworn it appeared from the opening statement of plaintiff's counsel that both parties claimed under said Joseph F. Meffert, as a common source of title. That plaintiff claimed he was the son of said Meffert, and was born of his marriage with Mrs.

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Marie Stripe, while said Mrs. Stripe was the wife of William H. Stripe, but was, nevertheless, his legitimate child under Section 342, Revised Statutes 1909.

Defendants thereupon objected to trying the case before a jury, because they "don't try equitable matters." The court overruled defendants' objection, but submitted to the jury the following special questions, which the jury answered in the affirmative, as follows:

"Question No. 1. Was there a marriage on or about September 3, 1914, between Joseph F. Meffert and Anna Marie Stripe?

"We, the jury, answer the foregoing question, Yes.

"A. L. Williams, foreman.

"Question No. 2. Is Frederick Meffert Stripe the issue of said marriage?

"Yes.

"A. L. Williams, foreman."

Upon the coming in of the verdict, the court made the following entry on the record:

"And now it appearing to the court that there are further issues in this cause, the said jury is discharged from any further consideration of the cause, and this cause is continued until tomorrow morning at 9:30 a. m."

It appears from the evidence before the jury, that plaintiff was born October 6, 1915. That his mother was about 33 years old in the early spring of 1913, when she first met Dr. Joseph F. Meffert, who was and for many years had been a practicing physician in Kansas City, and before coming to Kansas City, in Liberty, Missouri. She was then living with her husband, W. H. Stripe, a carpenter and contractor, who was doing work for Dr. Meffert, who was a man of some means and the owner of a number of houses in Kansas City. At the time, the Stripes had two little daughters aged respectively about four and eight years. They lived at 27th and Indiana Avenue. Dr. Meffert resided at 1622 Prospect Avenue. He was divorced from his wife in 1890, when they lived at Liberty. His former wife and their daughter and

only child, Anna Meffert, lived at Liberty. The Stripes were married in New Jersey, January 1, 1903. Mrs. Stripe had been left some property when her father died. She was then sixteen years old. She never attended the public schools, but was educated at private schools, and was also a graduate of—College, one of the highest class colleges for young women in the country. Her husband, Stripe, was interested with his brothers, one of whom was her guardian, in a manufacturing establishment, and invested and lost her inheritance in the business. They then moved west and had been in Kansas City for several years before she met Doctor Meffert. They became enamoured of each other at their first meeting in the early spring of 1913. Thereafter, he made love to her, and until she went to live with the doctor on September 3, 1914, they often met clandestinely and without her husband's knowledge. This happened two or three times a week. She was in love with Dr. Meffert as much as he was with her. She did not tell her husband of these meetings with the doctor, because "I knew what a disposition he had." She also knew it was wrong, because she was married to Stripe. Over defendants' objection that she was incompetent to testify to her agreement with said Meffert, because he was dead and the plaintiff claimed through and under said agreement, she testified, as follows:

On September 3, 1914 she went to live at the Meffert house. "He wanted me to be his wife and that we live together as man and wife. I told him that was impossible, that I was already married. We simply agreed to live together as husband and wife. Q. What was the agreement? A. We simply agreed to live together. Q. I want to know what the agreement was? A. I agreed to live with him as his wife. He agreed to be my husband and I agreed to be his wife." (Struck out as a conclusion). "He said, 'I will be your husband.' He asked me to come and live with him as his wife, and I told him I thought that would be impossible—that I was already married. He said as long as Mr. Stripe refused to

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give me a divorce, and I would live with him as his wife, Mr. Stripe could not prevent it in any way, and we would live together as man and wife any way. I didn't see how I could live there as his wife, when I was not divorced. He said he would be true to me and love me and take care of me, all of my life. I told him the same thing. We made a vow between us, that before God we would be true to each other. He then put a ring on my finger, and took off the wedding ring Mr. Stripe had given me. I was a Protestant, he was a Catholic, and I promised him, if any child was born of the marriage, I would bring it up a Catholic. He said he wanted an heir. When that promise was made, we commenced living together from that time on, September 3rd, and the baby was born October 6th the next year. I baptized it a Roman Catholic. During that time, I lived at no other place except 1622 Prospect Avenue, Dr. Meffert's home. He lived with me at that house all of the time. He was just as a husband could be, loving and kind; until his people came, there was no friction. He discharged the housekeeper, and that caused a great deal of trouble. I had her come back—there was so much scandal—I begged the doctor to take her back, and he did. I thought she would protect us. The baby was born at 1622 Prospect. The doctor was very kind to the child. He slept with it, until a few weeks before he died. He would not let anybody fix its milk but himself. The whole house was turned topsy-turvy to take care of that child. Before the baby came, and I was carrying the child, the doctor opened an account for me at the Parisian, that I might get things charged to myself. He introduced me there as his wife. They found out the doctor had a great deal of money and some one else had things charged there one time and he had a great deal of trouble and decided to close the account. I do not know of his buying clothing for other women while I was living with him. He ordered a maternity dress for me and they ordered it specially from New York. He bought the baby a baby-buggy; his mother paid something towards the buggy, she wanted to.

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From September 3rd, until the baby was born, I did not entertain or receive attention from any other man than Dr. Meffert. He told everybody about his beautiful baby. I was not there when the doctor died. I was at 36th and Agnes, me and the baby. At 1622 Prospect, he had his housekeeper and his mother. I left them on account of the friction and the scandal was so terrible that the doctor and I planned to go to California. Myself, the housekeeper, his mother and his brother's wife lived there. He instructed the banks to pay my checks. I signed, 'Mrs. J. F. Meffert.' He introduced me at the German American Bank as his wife. I was known at Nance's restaurant as his wife. We went everywhere together. At the Royal Theatre he told the usher to take his wife down and weigh her. The doctor showed me a will he had drawn after the baby was born. He said Mr. Lawson said, 'it was a fine and dandy will.' I have not seen or heard of it since. I took Mr. Lawson's word for it, there was no other will. My house was broken into while I was at the funeral and every paper taken out. Dr. Meffert said that he had provided in his will for his mother and me and the boy. We were left out and didn't get anything. He said he fixed a piece of property for me at 15th and Prospect for life, and at my death it would go to the baby. I have two little girls by my former husband—no boy. The boy is the picture of the doctor." (Struck out by the court). "After the baby was born, he tried to sell a piece of property at any price so he could get his wife and the baby out of the country on account of scandal and to protect the baby as well as he could from the 'threatening mobs.' The baby was six months old, when he died. He told numerous persons the baby was his boy. I had no sexual relations with Stripe after September 3rd, until the baby was born. I went to Stripe's house in March when the children had diphtheria. He came to 1622 Prospect Avenue several times to give the babies (children) outings. He would meet them outside and take them home. Doctor would usually stand at the door. He didn't like it. When my little girl was

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sick, he objected to my going there alone, and took me out himself and treated the little girl. That was the only time I went to Stripe's house." She did not tell Stripe about her vow with the doctor. Tried to conceal it as long as she could. Did not want the world to know. Asked him to give her a divorce, but he refused. Wanted to get a divorce from Stripe, so she could legally marry Dr. Meffert. She knew she had to have a divorce, before she could legally marry him. After September 3, 1914, Dr. Meffert called her Mrs. Meffert to all strangers and while there was no scandal. But when people knew her as Stripe, she had to shield "it as best I could. The scandal was about me living with the doctor, as his wife, and Mr. Stripe felt so bad." Stripe would not speak to her any more after she commenced living with the doctor; he was in such a frame of mind, she would not speak to him. After she commenced living with the doctor, Stripe fitted up one of the doctor's houses on 27th Street, near Indiana, and moved into it and kept his office there. That was about a block from where they had lived. The two little girls stayed a great part of the time with her at Doctor Meffert's, and part of the time with Stripe or his sister. Dr. Meffert gave her numerous checks payable to "Marie Stripe, because so many people knew me as Mrs. Stripe—the scandal was so great I wanted to shield myself and the baby as much as I could." When the little girls were at Stripe's house, they would call her, when their daddy was gone, "and I would go out to see them." There were lots of checks made out to "Mrs. Meffert." The doctor told the bank at Liberty to take her signature, "M. Meffert." She only signed one that way, because there was so much talk and scandal. She had none of the doctor's checks. She supposed the defendants had them. The checks were all made to "Mrs. Stripe," or "Marie Stripe," to shield her from the public. She frequently collected rents for the doctor for all of the property near where Stripe "bached" on 27th and Indiana. During the period covered by the checks, shown in evidence, from December, 1914, to March, 1916, "people usually knew her as 'Mrs. Stripe,'" Mr. Stripe continued at his work for

the doctor after September 3, 1914, the same as before, and the doctor was owing him money for such work when he died. In March, 1916, the doctor moved her and the child away from his home, 1622 Prospect, to 36th and Agnes, because the scandal had become so great. The doctor said his lawyer, Lawson, told him they would be arrested. She expected to have a public ceremony after she was divorced from Stripe. "We thought we were man and wife, but the public did not look at it that way, and we had to please the public and society. The doctor was trying to get a dispensation so we could be married by a priest." She said she filed a divorce suit against Stripe, but if Stripe contested it and said she was getting it to marry another man, she did not suppose she could get the divorce. This suit was filed on May 13, 1915. Besides alleging that "she had always faithfully demeaned herself" as Stripe's wife, the petition in her divorce suit further alleged "that he had offered her such indignities as to render her condition intolerable," and also, that "plaintiff is now again pregnant with child of which she expects to be delivered about the month of September. That since defendant became aware of such pregnancy, he has been more abusive than ever." The petition appeared to be duly sworn to and subscribed by her. She admitted signing it, but says she never read it, did not know what was in it, that it was prepared by the lawyer from information given him by the doctor. When she first went to the doctor's house, Mrs. Dresslaer, his housekeeper, and the doctor's niece, Miss Baker, were there. "Mrs. Dresslaer said, we weren't married; we said, we were. She kept saying this. She was such a sour old woman. I was not used to anything like that. Miss Baker told the doctor, if I was going to live there as his wife, she would leave. He told her to go, and she left. They both brought in gossip. The doctor had a lot of money, and they were afraid they would lose it. They said I ought to get a divorce and then marry the doctor. This scandal happened all the time. The doctor had a great many patients, and they would bring in news and say things. The doctor told some

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of them it was none of their business. Some of them had the impertinence to tell him he shouldn't have me there—just gossiping women. At one time the doctor offered Mr. Stripe twenty-thousand dollars, if he would give me up, and he refused. The two men could really never meet without going to pieces. Mr. Stripe would not agree, because he didn't want me to marry the doctor." Witness's divorce case was never tried, but after the doctor died, Stripe got a divorce from her on the ground of adultery with Dr. Meffert. She said the doctor told her that "under the laws of Missouri, he knew I could live with him as his wife and nobody could bother us." That "if I lived with him as his wife, if I never got a divorce, our children would be legitimate. I trusted him and believed everything he told me." He told her, he made a will providing for her and the baby and that his attorney, Mr. Lawson, had it. Meffert died about six months after the child was born, while its mother lived at 36th and Agnes. The doctor visited her there during the day time, but still kept up his establishment at 1622 Prospect Avenue.

The following witnesses also testified for plaintiff, as follows:

Charles Meffert, the brother of the doctor, and his wife, testified that the doctor introduced plaintiff's mother to them, as "their sister-in-law." But, on cross-examination, Charles testified repeatedly that the doctor told him that her husband, Stripe, was living, and she was going to get a divorce, and then they would be married. He was just keeping her there until that time. Charles was recalled to the stand next day by plaintiff, and said he had thought it all over again, and that he had made a mistake, that what the doctor said was, "She is my wife, and after the divorce, we are going to be publicly married." Both Charles and his wife testified that the doctor said the child was his. He resembled the doctor. Charles also testified that defendant Sylvia C. Barrick was the daughter of the doctor by a woman who claimed to be his wife by "a secret marriage or something," but the only marriage of the doctor that he knew anything about was to defendant Ann Meffert's mother.

M. S. Murray, testified: That Mrs. Fellows introduced plaintiff's mother to him, as he recollected, as "Mrs. Meffert." Dr. Meffert was in the room at the time.

Another witness said that she lived near Mrs. Stripe, when the latter lived at 36th and Agnes—one day she saw the doctor there, and he played with the child like it was his own son.

Margaret O'Rourke, a patient of the doctor's testified: that shortly after the plaintiff was born, she remembered that the doctor talked about the child as his boy, all the time, and said it looked like him. "The child looks just exactly like him."

L. E. Gunter testified: That the doctor referred to plaintiff's mother as his wife on one occasion, when they were in witness's restaurant, and that she was in a delicate condition. He "kidded the doctor about it."

Defendants' evidence:

John S. Major testified: That he was president of the First National Bank of Liberty, where Dr. Meffert kept his account. He was never told to pay any checks signed by "A. M. Meffert" or "Joseph F. Meffert by A. M. Meffert," or that that party was Meffert's wife. After the doctor's death, his checks, from the time of his last balance were turned over to his administrator. The cashier of the bank also testified to the same effect.

Martin E. Lawson, testified: That he was attorney for Dr. Meffert at Liberty, from 1893 until his death. The doctor was over at Liberty once a week. First knew him in 1890, when his wife obtained a divorce from him; drew up his will, which was read in evidence; never heard him mention Mrs. Stripe. In the month of September, 1914, prepared another will for him. At that time, he came to my office, and told me he wanted to change his will. I got out the original will, and told him I thought it well to read that over before making any changes; he noted down the changes he wanted made and left them with me to write up the new will. I prepared it or had it prepared according to his directions.

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When he came in again, he read it over, and suggested a few changes. I told him I would have it recopied. He did not come in for a week. He then read it over, and said it was all right, but he was on a deal to dispose of the 15th Street property, and if he did he might want to make a few minor changes. I said to him, he had been quite sick, "It might be well not to delay matters too long." He said, "The old will will stand, if I don't make this one?" I said "it would," and he replied "all right," and went out and never executed the new will. The new, unexecuted will, dated the "—— day of September 1915," was introduced in evidence, and showed no provision for nor mention of plaintiff or his mother. Witness was the executor of Dr. Meffert's will dated, 1904, which was duly probated and by which the property in question was devised to him as trustee for defendant Anna Meffert, the doctor's daughter. Witness, as such executor, with the witnesses, as required by law, took charge of the property and the papers of Dr. Meffert. He received the canceled checks from the First National Bank of Liberty and none were payable to Mrs. J. F. Meffert or to Mrs. Meffert, and none signed by Mrs. Joseph F. Meffert or A. M. Meffert or Marie Meffert or the doctor's name by any one of that description. There was only one check in the German American Bank, and that was payable to Mrs. Stripe. That balanced the account and was dated March 16, 1915. Mrs. Dresslaer, the doctor's house keeper, presented a claim against the estate for 18 years services, which, with the consent of the doctor's daughter, he allowed. Charles Meffert presented a claim on a note, which witness was resisting on the ground that it had been changed from \$29.50 to \$2950. The other one for \$500 has been changed so as to take it out of the Statute of Limitations. At the time witness consented to allow Mrs. Dresslaer's claim, he had no notice of any other person claiming an interest in the estate, except the deceased's daughter, Anna, and she consented. Witness identified a letter he wrote to Dr. William F. Meffert of Emporia, Kansas, saying he would like to have

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a talk with Charley Meffert or his wife, to find out what they knew about the Stripe case, and he might be able to make a proper arrangement, so far as their case was concerned, if he knew what facts they knew about the Stripe case. At that time, Dr. William Meffert and witness were trying to compromise the Charley Meffert case, and this letter was written in response to a conversation they had at Liberty in regard to compromising the case.

George W. Day testified: That he filed the petition for divorce for Mrs. Stripe against her husband, and got all the facts stated in the petition from Mrs. Stripe. She came to his office four or five times before the petition was filed. Got no information from Dr. Meffert, nor any one except Mrs. Stripe. She urged haste. She wanted the custody of the children in peace. When the case came up several times, she was too ill to appear, and it was continued. After her child was born, some one called witness to go out to Dr. Meffert's house to see her. He went, and she said to drop the case, which was done. The information as to her pregnancy, at the time the petition was filed, as therein alleged, was given to him by Mrs. Stripe. Witness had examined abstracts and attended to other matters as attorney for Dr. Meffert for six or seven years before his death. When she consulted witness about her divorce in May, 1915, witness was given her address as 3408 East 27th Street (27th and Indiana), according to the memorandum which he made at that time. After the divorce petition was filed Mr. Ellis told the witness that he represented Stripe, and that Stripe said that Mrs. Stripe and the doctor had been guilty of adultery; that the doctor had alienated her affections, and that he (Stripe) intended to sue the doctor on account thereof.

T. C. Sparks testified: That he was a notary public and swore Mrs. Stripe to her petition for divorce; that she read it over, and said, that she understood and it was all right. Then she swore to it and signed the affidavit in his presence.

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L. A. Gladdish, credit man at Harzfeld's, testified: That Mrs. Stripe had no account there in her name, but on December 4, 1914, she signed an application in her name, Marie B. Stripe, for a credit account in the name of Dr. Meffert. She said, she and the doctor were going to get married. This account ran in the doctor's name for about a year, and then he revoked it by a letter. The witness put in evidence, both the application signed by Marie B. Stripe and the letter signed by Dr. Meffert.

Celia Dresslaer, the doctor's housekeeper, for many years before his death, said, that about the first of September, 1914, Mrs. Stripe came to the Doctor's house, 1622 Prospect Avenue, to board. The doctor said, Mrs. Stripe wanted to bring her children and come there to board for a short time until Mr. Stripe got the building fixed up at 27th and Indiana; there were rooms upstairs that they wanted to occupy. Witness objected, because the work would be too hard for her. But Mrs. Stripe came the next day. She said, "I won't be here long and will help with the work." She had one of her little girls with her. She stayed, but did not help much. Witness told the doctor, she could not stand it, and that she would go back to Liberty. She went in November, 1914, but, at the request of the doctor, came back and collected a couple of months' rent for him. Mr. Stripe was there and took his meals several times before witness left. Mrs. Stripe went out nearly every evening and said she was going to 27th and Indiana to see Mr. Stripe. It would be eleven or twelve o'clock sometimes before she got back. That was the situation until witness left in November. She came back and collected the rents for December and January, when the Doctor said, Mrs. Stripe said, she would collect the rents, and witness did not collect any more. Witness returned in March, 1915. The doctor told her Mrs. Stripe had gone, but she came back that same day, and said she had been gone six weeks. In April, the doctor's mother and invalid brother came. Mrs. Stripe was back and forth, but never stayed at night until May when she returned to stay. Witness

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could then see what condition Mrs. Stripe was in. Mrs. Stripe said, that she was threatened with a miscarriage, and Mr. Stripe thought it would be cheaper for her to come there and stay, and have the doctor treat her, than have him go to see her. So she came there for treatment. Mr. Stripe came afterwards several times before the child was born and took meals there. He was there the evening before the child was born. After the child was born, Mr. Stripe called her up over the 'phone and witness answered. She told Mrs. Stripe that Mr. Stripe said,—that he asked if the mother and father were doing well, and she told him the mother was, and he ought to know whether the father was. But he said, he did not know about the father. When witness told Mrs. Stripe that, she said, that he was a liar and just wanted to "start something" on Dr. Meffert. The child was born on October 6, 1915. The doctor died March 29, 1916. Mrs. Stripe had gone away to 36th and Agnes a month before the doctor's death. The doctor was very fond of children and of this Stripe child. Never heard the doctor speak of its parentage. Mrs. Stripe and the doctor never occupied the same room or the same bed to the knowledge of the witness. They had separate bed-rooms. On one occasion in October, 1914, when Mr. Stripe came over, Mrs. Stripe met him out in front and he greeted her with a kiss. Then they both came in and ate dinner. Mr. Stripe ate dinner at the house six weeks or two months before the baby came. He spent the whole afternoon that day with Mrs. Stripe in her room. He was working for the doctor then. The doctor dined with us. The child was christened by a Catholic priest. The doctor and his mother were both Catholics. Mrs. Stripe said, she was a Protestant. Dr. Meffert held the baby in his arms during the entire ceremony. They named the child, Frederick Meffert Stripe, before he was baptized. Never heard any discussion between Dr. Meffert and Mrs. Stripe with reference to the name of the child. Before Mrs. Stripe left 1622 Prospect and went to 36th and Agnes, there was such a disagreeable situation, that final-

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ly she and the child went over there. The doctor went over to see the child, when it was sick. He never stayed there at night. He was sick at home for about ten days before he died. When witness found the doctor had not left her anything for her wages, she felt she had a claim against the estate. She put in a claim, to which Miss Anna Meffert consented. The doctor's mother died the 15th of December before the trial.

Bessie Baker testified: She lived at her uncle, Dr. Meffert's, for two years before November, 1914. A couple of weeks before she left, Mrs. Stripe came there, to board until her husband fixed up a place at 27th and Indiana. That is what Mrs. Stripe said. Mrs. Stripe would leave every evening after supper and say she was going to 27th Street to see Mr. Stripe. Mrs. Stripe slept with the witness the first two or three nights she was there. After that she and her little daughter, Constance, slept together in the north bed-room. The witness worked for the Board of Education at the Public Library. Mrs. Stripe's being there had nothing to do with her leaving there. While she was there, they called plaintiff's mother, Mrs. Stripe, including the doctor. Never heard her called by any other name.

Mrs. Kate Abbot testified: She was a nurse and nursed Mrs. Stripe's baby at 1622 Prospect. Dr. Meffert introduced her to witness as Mrs. Stripe. No one there called her anything else. Mrs. Stripe paid her for her services when she left. The doctor seemed to think a lot of the baby.

Defendant Anna Meffert testified: She and her mother lived at Liberty. She was in the millinery business at Liberty, which her father, Dr. Joseph F. Meffert, started for her in the spring of 1905. She was at her father's house several times when Mrs. Stripe was there. Mrs. Dresslaer called her, "Mrs. Stripe." Her father said she was collecting rent for him. That was in the summer before her (Mrs. Stripe's) child was born. Witness and her father were always on good terms. He often called on her at her store in Liberty.

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In rebuttal, plaintiff's mother denied saying that Mr. Stripe was a liar, when he said he did not know anything about who the plaintiff's father was. The other testimony in rebuttal was substantially as testified to before or unimportant.

At the close of the testimony, the court gave and refused certain instructions for plaintiff and defendants. Among those instructions refused for defendants, was a demurrer to the evidence.

The jury then returned a verdict answering the specific questions heretofore set out, and the cause was continued several times for the hearing of further testimony. On January 31, 1919, in lieu of further testimony, the parties agreed to submit a stipulation in said cause, and said cause was submitted on stipulation and taken under advisement.

On February 5, 1919, judgment was entered in which the court adopted the special verdict of the jury, and found that plaintiff was the legitimate child of Dr. Meffert, and not being mentioned in his will, said Meffert is deemed to have died intestate, as to the plaintiff. The court further found, that Sylvia C. Barrick had transferred her interest to defendants, Lawson, executor, and Anna Meffert with respect to which plaintiff and defendants entered into a stipulation, which is approved by the court, and provides, that if plaintiff is finally adjudged to inherit an interest in said property, his interest shall be charged with his proportionate share of \$5,000, which said defendants paid said Sylvia C. Barrick for her interest in said estate. Said instrument further provided, that said cause be and the same is here and now finally submitted to the court for decree. Judgment was, therefore, entered for plaintiff, declaring, that he was entitled to an undivided one-half interest in the real estate described in the petition, subject to said stipulation, and the defendants to the remainder, subject to the will of said Meffert.

Within four days after the rendition of said judgment and at the same term of court, defendants filed

their motion for new trial, which being overruled, they appealed to this court.

I. The first point made by respondent is, that the motion for new trial was not filed within four days from the filing of the verdict. The statute requires the motion to be filed within four days "after the trial" of the case. [Sec. 2025, R. S. 1909.] Usually the trial, if the suit is at law, is ended with the coming in of the verdict, because that determines all of the issues necessary to found the judgment upon. But in this case, plaintiff claimed the entire fee in the land. Defendant Lawson, as executor, also claimed the entire fee, as trustee for defendant Anna Meffert. The only issue submitted to the jury was whether plaintiff was Dr. Meffert's son, born of a marriage with Mrs. Stripe. No judgment for plaintiff could be based upon that finding alone. The title of defendants, as claimed under the doctor's will, remained yet to be determined. Notwithstanding plaintiff might have been his son—and even his legitimate son—the will might have vested the entire estate in the daughter or others. Indeed, the daughter might have had an interest also by reason of her purchase from her co-defendant Sylvia C. Barrick, recited in the decree because there is evidence, that said Sylvia was the doctor's daughter by a "secret marriage or something" with still another woman. So that, whether the defendants or plaintiff had any interest in the land, and what interest, had to be, and was determined, after the special verdict in this case was rendered. It was so determined by the court without the further intervention of a jury, but not until the day the judgment was rendered. Hence, the trial continued until that date, and the motion for new trial, being filed within four days thereafter, was filed within the time required by the statute. This is true, whether the suit was in law or in equity.

II. The respondent earnestly contends, that the proceeding is one strictly at law, and, therefore, we

cannot review the evidence and try the case *de novo*, but are bound by the finding of the jury and court below, as to the facts, and can only consider errors of law. It is true, that plaintiff vigorously contended below, that the suit was at law, that he was entitled to a jury trial and refused to waive a jury, so far as the issue of his legitimacy was concerned. But evidently, the court was of opinion, that it was a chancery case, or that the issue of plaintiff's legitimacy was an equitable issue; because it did not enter any judgment on said verdict, but adopted it as part of its findings of facts, and then rendered judgment thereon, as in equity cases. The verdict was treated as merely advisory, as in equity cases. The subsequent matters in issue, as well as the settlement with Sylvia C. Barrick, the approval and enforcement of which involved the exercise of the equity powers of the court, were disposed of by the court without a jury with respondent's acquiescence and consent. Under such circumstances, the case may well be ruled as having been tried below as a chancery case, with respondent's consent, and, hence, will be so tried *de novo*, in this court. *Harwood v. Toms*, 130 Mo. 225; *Röselle v. Beckemeir*, 134 Mo. 380.

III. Plaintiff bases his whole right to recover upon Section 342, Revised Statutes 1909, which is as follows: "The issue of all marriages decreed null in law, or dissolved by divorce, shall be legitimate."

The plaintiff claims, that he is the issue of a marriage "decreed" null in law, under this statute; that the word "decreed" is a clerical error for the word "deemed," which was in the law as originally passed by the Legislature, but was inadvertently changed to "decreed" in printing the Revision of 1865, and had been inadvertently retained in all the successive revisions of the statutes since that time. Learned counsel are in error. An examination of the original enrolled bill of the General Statutes of 1865, being Section 11 of Chapter 135, of such enrolled bill, in the office of the Secretary of

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State, shows, that the word "decreed," not "deemed," is plainly written therein. The issue raised under said section is of equitable cognizance, as has been authoritatively, and we think, correctly settled in this State in the case of *Green v. Green*, 126 Mo. 17, opinion by MACFARLANE, J. In that case, this court said, pp. 22, 23, 24:

"The policy of our law is to make legitimate children of all marriages contracted honestly and in good faith by one of the parties. The children of such marriages when entered into in good faith by one, or both of the parties, should not in right be stigmatized as bastards, and disinherited on account of the fraud of one, or the honest misapprehension of both of the parents. To carry out this policy remedial statutes have been passed modifying the harsh common-law rule on the subject. Thus our statute on the subject of divorce which gives one party a right to dissolve the marriage in case the other had a husband or wife living at the time it was contracted, expressly provides that no such divorce shall affect the legitimacy of the children [Section 4500.] This provision has been retained on our statute books since the revision of 1845 and possibly longer. Again, under our statute law of descents and distribution it was declared as early as 1825 that, 'the issue of all marriages deemed null in law or dissolved by divorce shall nevertheless be legitimate.' [Revised Statutes 1825, page 328, sec. 8.]

"The Act of 1825 was continued in force through the revisions of 1835 and 1845 without change. In the revision of 1865 the word 'deemed' used in the original act was changed to 'decreed.' So that the section reads: 'The issue of all marriages decreed null in law, or dissolved by divorce, shall be legitimate.' This change has been continued through the revisions of 1879 and 1889. [R. S. 1889, sec. 4475.]

"Plaintiff now contends that under the act, as it now stands, the defendants are illegitimate and incapable of inheriting from their father, William Green, though his marriage to their mother was in entire good faith on

her part. This contention is put upon the ground that there had never been a formal decree annulling the marriage. We do not think the Legislature ever contemplated so radical a change in the law. If the change had only appeared in one revision we would not hesitate to hold that it was made through inadvertence. [Jones v. Driskill, 94 Mo. 200; Hyatt v. Wolfe, 22 Mo. App. 191; Turner v. Babb, 6 Mo. 347.] "But, assuming that the word decreed was used intentionally, we think it should not be given the meaning attributed to it by plaintiff. Assuming, as we do, that the word 'decreed' was intentionally used, we think the Legislature did not intend that its meaning should be materially different from the word 'deemed' used in the original act. We think the act should be given a sensible and practical interpretation, and if upon the trial of a cause in which the legitimacy of children is involved, the evidence shows such a state of facts as would justify a court of equity in declaring the marriage null and void, the children of such marriage would be legitimate by virtue of the statute. The Legislature may have contemplated that a decree to the effect that the marriage was void, should be entered when the fact is so found, and that may be the better practice, but we do not think it essential in order to give effect to the statute."

We hold the true interpretation of the statute is as above suggested by MACFARLANE, J., that the children to be legitimate thereunder must be the issue of parents between whom there was, not only a *marriage*, but such a marriage as would be decreed null in law, or dissolved by divorce in a proceeding in equity between the parties to such marriage. In an action to annul a marriage in equity, for any reason, or for divorce, if both parties knowingly lived in adultery, there would be no marriage to annul, and neither would be an innocent or injured party, and neither would come into court with clean hands, and no relief would be granted to either.

Accordingly, we hold, in harmony with the case of Green v. Green, *supra*, and basic equitable principles, that unless such marriage is entered into by one or both

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of the parents honestly, innocently and in good faith, it is not such a marriage as is contemplated by said Section 342. This conclusion is also supported by this court in the case of *Nelson v. Jones*, 245 Mo. 1. c. 597, where the court said: "In the Green Case some stress is laid on the good faith of at least one of the parties contracting the second marriage. It may well be that in order to constitute a marriage at all, there should be an element of good faith, a bona-fide intention to marry, as over against an intention to indulge a mere prank or mere casual sexual commerce."

We have also examined all the cases heretofore decided by this court construing this statute cited by counsel and in each case there was good faith on the part of one or both of the parents contracting the marriage. [*Lincecum v. Lincecum*, 3 Mo. 441; *Johnson v. Johnson*, Admr., 30 Mo. 80; *Buchanan v. Harvey*, 135 Mo. 276; *Dyer v. Brannock*, 66 Mo. 396; *Bishop v. Brittan Inv. Co.*, 229 Mo. 699.]

Especially can there be no so-called common-law marriage, unless bottomed upon good faith—a bona-fide intention to create and enter into a legal marriage. [*Perkins v. Silverman*, 223 S. W. 895 (this court).]

The language of the court in the case of *Stones v. Keeling*, 5 Call. (Va.) 143, relied upon by respondent, as holding that under such a statute, as ours originally was, the marriage may be even criminal, as to both parents, was not necessary to the decision of the case and may be regarded as a mere *dictum*. In that case, the court said, page 146: "We cannot in this case say, that it was criminal. Circumstances may exist, such as a belief of the death of the first husband or a seven years' absence by him, which may render the second marriage even innocent."

Greenhow v. James, Exr., 80 Va. 641, rules that their statute does not contemplate an absolutely void and criminal marriage as to both parties. But neither said cases, nor cases from other states, cited by learned counsel for respondent, apply to our statute, since its amend-

ment in 1865 by inserting the word "decreed" in lieu of the word "deemed" in the original act.

We are all the more persuaded, that there must be a bona-fide marriage by at least one of the parents under said Section 342 of our statutes, by reason of the provisions of the immediately preceding Section (341, R. S. 1909) which

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is as follows: "If a man, having by a woman a child or children, shall afterwards intermarry with her, and shall recognize such child or children to be his, they shall thereby be legitimated." This section covers the case of an adulterine bastard, or a child born of a married woman and a man not her husband, with whom she has committed adultery. In such case, the question of good faith in the relations of the parents at the time the child was conceived or born is not regarded. Though their sins be as scarlet—yet, if they afterwards contract a legal marriage and recognize their children, such children shall stand legitimate before all the world. [Busby v. Self, 223 S. W. 729 (this court).] These two sections must be read and construed together, they supplement and complement each other. When so read, one (Sec. 342) covers the case, where there was a *marriage* between the parents, but it would be decreed null in law. There can be no marriage without a bona-fide intention to marry in compliance with the law of the State where the marriage is contracted, because marriage is a legal relation, and if the intention of the parties to it is to form a relation contrary to or in defiance of the law, they can have no intention to enter into a marriage at all. It frequently happens that parties in good faith intend to marry in compliance with the law—to form a legal relation—but it turns out that some fact exists, not within their knowledge at the time, which renders such marriage null and void in law, such as one or both of them having another spouse from whom they erroneously supposed they were freed by death or divorce, or they were related within the prohibited degrees of consanguinity, or other impediments of which they were

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ignorant, existed which rendered their marriage void. In all such cases, there would be a marriage which would be decreed null in law, to which said Section 342 would be applicable, and the issue of such a marriage would be legitimate thereunder. But Section 341 applies to cases where the relationship between the parties at the time the child was conceived, was illegal and criminal, as to both parents, and in such case, that section requires a subsequent legal marriage of the parents to make the children legitimate. Both sections were not intended to cover the same ground.

We hold, that said Section 341 governs, when there is no marriage, or, what is the same thing, where the alleged marriage was prohibited by law and absolutely void and criminal, as to both parents, and said Section 342 governs, when there was a bona-fide marriage, at least, so far as one of the parties was concerned, but yet would be decreed null in law.

IV. This case is governed by said Section 341, and not by said Section 342, because the alleged marriage (if there was any such marriage, at all, which we need not pass on) between Dr. Meffert and Mrs. Stripe, was absolutely null and void and criminal, as

Adultery:
Guilty
Knowledge.

to both parties—because both parties knew Mrs. Stripe was the wife of W. H. Stripe at the time their alleged marriage took place and during its continuance. It was doubly criminal on her part, because she was guilty both of adultery and bigamy. He was guilty of adultery and, perhaps, also of bigamy, because there was evidence that Sylvia C. Barrick was his daughter by a secret marriage with her mother which might have been valid and from whom he was never divorced. Every one is presumed to know the law. The acts of Dr. Meffert and Mrs. Stripe would still be as criminal, even though they had been ignorant of the law. But, in this case, we find that both of them, as a matter of fact, did know the law, and that their relations were a wilful and defiant crime against both the law of God and man, as they knew and believed it to be. For plaintiff to recover

under said Section 341, he would have to show, not only that he was the child of Dr. Meffert and Mrs. Stripe, but that after he was born, and their adulterous cohabitation was terminated, they consummated a legal marriage and recognized him as their child. This was never done.

V. It follows, also, from the undisputed fact that both Dr. Meffert and Mrs. Stripe knew she was the wife of W. H. Stripe, when their alleged marriage occurred and during its entire existence, **Knowledge.** even if this were a case strictly at law, the judgment would have to be reversed, because in that event the demurrer to the evidence before the jury, which passed on the special questions submitted to them, should have been given. There was no evidence to sustain the finding of the jury, that there was a marriage between Dr. Meffert and Mrs. Stripe, within the meaning of either of said Sections 342 or 341 of our statutes.

VI. Whether the plaintiff is, in fact, the son of Dr. Meffert, or Mrs. Stripe's husband, is not necessary for us to decide. The non-access of the husband is required to be shown in such cases by clear and convincing evidence; otherwise, the presumption is **Presumption.** that the wife's husband, and not her paramour, is the father of her child. Nothing we have said is intended to convey the impression, that the plaintiff is not legally entitled to the name he bears. We do not pass on that point.

The judgment of the lower court is, therefore, reversed, and the cause remanded to the court below, with directions to set aside its decree heretofore rendered, and enter judgment, that the plaintiff has no right, title nor interest in the property sued for, but that the same is vested in the defendant, Lawson, executor, in trust for the defendant, Anna Meffert, under the terms of the will of said Joseph F. Meffert, deceased. *Brown and Ragland, CC., concur.*

PER CURIAM:—The foregoing opinion by SMALL, C., is adopted as the opinion of the court. All of the judges concur.

FANNY J. BEARDSLEY v. JOHN P. BASS, Administrator of Estate of HERBERT C. BEARDSLEY, and ESTELLA B. BASS, Appellants.

Division One, April 9, 1921.

HUSBAND AND WIFE: Contract Looking to Divorce Void: Non-Severable Clauses. A married couple entered into a contract whereby the husband agreed to pay the wife \$200 per month during the rest of her life unless she should decide that she wished to remarry, in which case he was to secure a divorce on the grounds of desertion, the monthly payment to start as soon as the wife should leave him and to cease when he should be notified of her desire to remarry. Other clauses provided that he should keep alive a certain \$12,000 policy of life insurance for her benefit, to be discontinued, however, upon her remarriage; that if he died first she should inherit all his property, provided she had not remarried in the meantime; that she should at any time sign any deed or other instrument necessary to enable him to conduct his real estate or other business; that she should in no way interfere with or obstruct him in the conduct of his business; that in case of her remarriage she should transfer to him all her rights in his property and in any property that they might have conjointly; that she would sign no legal paper of any kind without his permission, and would incur no debt to be paid by him; and that the furniture in the flat then occupied by them should be sold and the proceeds divided equally between them. *Held*, first, that this contract in its entirety was void, because it was intended to promote and facilitate a divorce; and, *second*, that the other provisions could not be validated by eliminating the divorce clause, since the contract was not severable.

Appeal from Buchanan Circuit Court.—*Hon. Lawrence A. Vories*, Judge.

REVERSED.

W. B. Norris and *W. M. Morton* for appellants.

Contracts facilitating actions for divorce are void and illegal and any promise founded on such an agree-

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ment is not enforceable. Blank v. Nohl, 112 Mo. 169; Hudson v. Hudson, 176 Mo. App. 69; McDonald v. McDonald, 175 Mo. App. 513; Banner v. Banner, 184 Mo. App. 396; Hamilton v. Hamilton, 89 Ill. 349; Sayles v. Sayles, 21 N. H. 312; Davis v. Hinman, 73 Neb. 850, 103 N. W. 668; Barngrover v. Pettigrew, 128 Iowa, 533, 104 N. W. 904; Muckenbergh v. Haller, 29 Ind. 139; Seelly's Appeal, 56 Conn. 202, 14 Atl. 291; Smutzer v. Stinson, 9 Colo. App. 326, 48 Pac. 314; Beard v. Beard, 65 Cal. 354, 4 Pac. 229.

Eastin & McNely for respondent.

The contract is legal. 9 Cyc. 521; 21 Cyc. 1592; Garbut v. Bolling, 81 Mo. 214; Rough v. Rough, 195 S. W. 501. It contains no illegal provision. The words complained of are: "Unless the said party of the second part should decide that she wishes to remarry, in which case it is fully agreed that the said party of the first part shall secure a divorce on the ground of desertion." The situation of the parties, as it is made to appear by the whole contract, must be considered in arriving at a correct interpretation of this language. The agreement is one for permanent separation. The husband agrees to pay the wife \$200 per month while she is living apart from him and "during the rest of her life." By a succeeding paragraph he agrees "to continue the payments (on life insurance) which is and shall be payable to the party of the second part at the decease of the said party of the first part." The parties therefore contemplate that they shall remain husband and wife, even though separated, until the relation shall be dissolved by the death of one of them. If the wife should decide that she wanted to re-marry, that would be an abandonment or desertion, and would give the husband the right to a divorce, and he also claimed the right (and it was so written in the contract) to a cessation of the payments he had agreed to make. Even if the divorce provision is illegal it is separate from the other parts of the con-

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tract and they are enforceable. Wharton, Contracts, sec. 338; McCullough v. Smith, 243 Fed. 832; Rosenblatt v. Townsley, 73 Mo. 536.

WOODSON, P. J.—This is a bill in equity brought by the plaintiff against the defendants in the Circuit Court of Buchanan County to specifically enforce a contract made and entered into between husband and wife as set forth in the petition, which reads as follows:

“Plaintiff for cause of action against the defendants states that she is the widow of Herbert C. Beardsley deceased; that defendant John P. Bass is the administrator of the estate of Herbert C. Beardsley, deceased, duly appointed and qualified by the Probate Court of Buchanan County, and that defendant, Estella B. Bass, is the wife of said John P. Bass, administrator aforesaid, and only surviving sister of Herbert C. Beardsley, deceased; that said Herbert C. Beardsley left surviving him no child or children and no descendant of a deceased child and no brother or sister other than the said Estella B. Bass.

Plaintiff further states that on the 20th day of November, 1916, she entered into a contract with said Herbert C. Beardsley, by the terms of which the said Herbert C. Beardsley for a valuable consideration agreed either to convey or assign or devise to plaintiff, all the property, real or personal, which he might own at the date of his death; that said contract is in words and figures as follows:

“ ‘This agreement, made and entered into this 20th day of November, 1916, by Herbert C. Beardsley, party of the first part, and Fannie C. Beardsley, party of the second part, both parties being of Buchanan County, State of Missouri, as follows:

Said party of the first part agrees to pay to the said party of the second part, while the said party of the second part is living apart from the said party of the first part, the sum of \$200 per month or \$46.16 per week during the rest of her life, unless the said party of the second part should decide that she wishes to re-marry, in

which case it is fully agreed that the said party of the first part shall secure a divorce on the grounds of desertion and said payments to be made by him shall cease from the date he is notified that the said party of the second part wishes to marry again. These payments are to start as soon as said party of the second part leaves the said party of the first part.

“ ‘It is further agreed that the said party of the first part shall continue the payments on the \$12,000 policy of life insurance in the New York Life Insurance Company, which is and shall be payable to the said party of the second part at the decease of the said party of the first part as per term of said policy. Said insurance to be discontinued at the re-marriage of the said party of the second part.

“ ‘It is further agreed that if the party of the first part should die before the party of the second part, that she, the party of the second part, is to inherit all realty and such other property that is in the name of the said party of the first part at the time of his demise, provided, that she has not remarried by that time.

“ ‘It is further agreed by the party of the second part that she will at any time sign promptly any deeds or other instruments of writing necessary for said party of first part to properly trade, transfer or otherwise conduct his real estate or any other business that he may be engaged in.

“ ‘It is further agreed that the said party of the second part will in no way interfere with or obstruct the said party of the first part in the conduct of any business that he is in or may engage in, or in any employment that he may seek or hold.

“ ‘It is further agreed that in case of the re-marriage by the said party of the second part, that she will, previous to said marriage, transfer by proper deed, all rights, title and interest that she may have at that time in any or all property of said party of the first part to him and all rights, title or interest that she may have in any property, real or personal, held conjointly by both parties to this agreement.

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“ ‘It is further agreed by the said party of the second part that she will sign no legal papers of any kind, notes or other articles of indebtedness, without the permission and consent of said party of the first part. That she will incur no bills or other indebtedness that will have to be paid by the said party of the first part.

“ ‘It is further agreed that the furniture, etc., now contained in the flat at 216½ North Eighth Street, St. Joseph, Mo., now occupied by the two parties to this contract, shall be sold and the proceeds divided equally between the two parties agreeing herewith, excepting (a) such articles that have been given as presents to the said party of the second part, which are and shall be her individual property, (b) such books as the said party of the first part may want, also one writing desk.

“ ‘We, the said parties of the first and second part have herewith attached our signatures to the above articles of agreement, in duplicate, one copy to be kept by each party, the day and date above mentioned at St. Joseph, Buchanan County, Missouri.’ ”

To this bill the defendants filed a demurrer, which the court overruled and the defendants declining to plead further, rendered a decree for the plaintiff as prayed for.

From that judgment the defendants duly appealed to this court.

I. Several errors are assigned, but from the view we take of the case it will be necessary to consider but one of them, and that is that the contract shows upon its fact that it was a contract of separation made by and between husband and wife, and for a decree of divorce to be rendered in a case to be brought by him against her upon the grounds of desertion. The contract in that regard reads: that the husband was to pay the wife \$200 per month unless she should decide that she wanted to remarry, in which case it was agreed that “he shall secure a divorce on the grounds of desertion and said payments to be made by him shall cease from date that he is noti-

fied that the said party of the second part wishes to marry again."

This contract clearly contravenes Section 2371, Revised Statutes 1909, which provides that "the petition [for divorce] shall state the facts of the case, and be accompanied by an affidavit that the facts stated herein are true, and that the complaint is not made out of levity or by collusion, fear or restraint between the parties for the mere purpose of being separated from each other, but," etc.

Counsel for respondent, with more plausibility than sound argument, contends that this clause can be eliminated from said contract and not change the meaning thereof, and the remainder would still constitute a valid and binding contract, and therefore enforceable in a court of equity.

After careful consideration of that argument we are unable to lend our concurrence thereto, and do not believe that the contract would ever have been entered into, had that clause been omitted at the time of its execution.

For the reasons stated we are of the opinion that the contract was void, and non-enforceable and for that reason the judgment of the circuit court is reversed and a decree is here rendered for the defendants. *Graves, J.*, concurs in separate opinion, in which *James T. Blair* and *Elder, JJ.*, concur.

GRAVES, J. (concurring).—I concur in the result reached by my learned brother in this case but do not agree that the statute he cites is relevant to the issues involved. This statute only pertains to pleadings in a divorce suit. It has no reference to contracts which are void as against public policy. It is true that the same public policy which voids collusive contracts as to divorces prompted this statutory provision as to pleadings in a divorce suit. But this statute does not make contracts void.

The real question is whether or not the contract pleaded is void because violative of public policy. The

learned counsel for respondent contend (1) that the contract is not void as being against public policy, and (2) that if a portion of the contract is void for such reason, such portion is severable from the remaining portions, and the remaining portions can be specifically enforced. Appellants contend contra on both propositions.

In *Blank v. Nohl*, 112 Mo. l. c. 169, it is said: "The authorities are numerous to the effect that any agreement that the defendant in a divorce suit will not make a defense, or having for its object the dissolution of a marriage contract, *or designed to promote and facilitate a divorce* is void, because opposed to the policy of the law; and any promise founded on such an agreement is also void, and should not be enforced."

The italics, *supra*, are ours. This is the public policy of Missouri succinctly stated, and we do not understand that respondent's counsel seriously controvert this view. They contend that the contract set out in the petition does no violence to this rule of law. They urge that if the wife decided to marry again that such decision would amount to desertion, and the contract only provides for a right which the husband would have under the law, i. e. sue for divorce because he had been deserted. The particular clause reads: "Unless the said party of the second part should decide that she wishes to re-marry, in which case *it is fully agreed that the said party of the first part shall secure a divorce on the grounds of desertion* and said payments to be made by him shall cease from the date that he is notified that the said party of the second part wishes to marry again."

The italics, *supra*, are ours. Note the use of the word "shall" as used, *supra*. There is nothing left (if the contract is to be lived up to) but for the husband to sue the wife for divorce whenever she notifies him that she desires to marry again. But this is not all. No fair interpretation of this contract can exclude the idea that the parties were likewise agreeing that there should be no defense made to the suit which the contract com-

pelled the husband to bring. This idea is not expressed in definite terms but the whole tenor of the instrument so shows.

This clause, in my judgment, voids the whole contract. I do not believe that it is severable from the remaining clauses. It constitutes a vital portion of the agreement. It gives tinge and color to the whole instrument. It was "designed to promote and facilitate a divorce." To the wife it says, all you have to do is say you want to marry again and your husband must sue you for divorce. *Inter alia*, it further indicates to her "but if he does, you must not defend." I feel that this contract cannot be upheld, and that the judgment in the circuit court is wrong and should be reversed and judgment entered here dismissing plaintiff's bill. *James T. Blair and Elder, JJ.*, concur in these views.

JOSEPH SCHLITZ BREWING COMPANY v. MISSOURI POULTRY AND GAME COMPANY et al.,
Appellants.

Division One, April 9, 1921.

1. **CORPORATION: Ultra Vires: Enforcement of Executed Contract.** It is the settled rule of law in Missouri that the defense of *ultra vires* is not admissible to prevent the enforcement of the contract of a corporation, where the contract has been fully executed on one side, unless it is a contract expressly prohibited by law; and this principle extends to executed contracts for the purchase by a corporation of goods in which the corporation has no authority to deal; and it permits recovery of the price of such goods, purchased and delivered.
2. ———: **Estoppel.** The provision of Section 9749, Revised Statutes 1919, and Section 7, Article 12, of the Constitution of Missouri, that no corporation shall engage in business other than that expressly authorized in its charter, or the law under which it may have been or may hereafter be organized, does not prevent the application of the doctrine of estoppel.
3. **STATUTE OF FRAUDS: Oral Contract of Sale: When Valid.** In an action to recover the balance due on an oral contract for goods sold and actually delivered, amounting to \$9472.50, the fact that

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the contract was not by its terms to be performed within one year is no defense.

4. **EXECUTED CONTRACT: Mutuality.** Where a contract for the delivery of beer, while it prescribed the terms of payment by the purchaser and set forth many other details, did not obligate the brewer to make deliveries but he did in fact, for a series of years, make such deliveries, in large quantities. *Held*, that, in an action by the brewer to recover a balance for the beer delivered, want of mutuality was not admissible as a defense; the shipments and acceptance supplied the consideration to support the contract.
5. **SALE OF GOODS: Bond: Case Adjudged.** In the year 1905, a corporation organized for the purpose of dealing in dressed poultry, game and country produce, executed a bond with sureties which recited that it had agreed to purchase beer from a brewing company for a period of ten years, and to sell this company's beer to the exclusion of all other malt beverages, and that the brewing company consented to sell and ship beer to the Poultry & Game Company, from time to time, as needed in its business, at prices agreed upon; that the Brewing Company reserved the right to change any or all of the prices from time to time, without notice to the purchaser or its sureties; and that it also reserved the right to terminate the agreement to sell beer at any time without notice. The bond further recited that the Brewing Company had agreed to extend to the purchaser a standing credit of \$10,000. The Brewing Company did not sign this bond or the contract recited in it, but did for a period of six years furnish beer in large amounts, as ordered. *Held*, first, that the contract, not being expressly prohibited by law, and not being *malum in se*, or contrary to public policy at the time it was made, was enforceable against the Poultry & Game Company and its sureties, although not signed by the Brewing Company; *second*, the fact that the contract was not to be wholly performed within one year was no defense; and *third*, the contract was not void for want of mutuality, the Poultry & Game Company having accepted the beer.

Appeal from St. Louis City Circuit Court.—*Hon. Rhodes E. Cave*, Judge.

AFFIRMED.

Charles B. Stark and Jourdan, Rassieur & Pierce,
for appellants.

(1) Plaintiff cannot recover on the bond and contract, in an action on contract, because the contract

was *ultra vires* of the Poultry & Game Company as defined in its articles of incorporation, and the constitutional provision and statute governing the powers of corporations. Sec. 7, Art. 12, Mo. Constitution; Sec. 2990, R. S. 1909; *De La Vergne Co. v. German Sav. Instn.*, 175 U. S. 40; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 18 L. R. A. 252; *Anglo-American Land, Mtg. & Agency Co. v. Lombard*, 132 Fed. 721; *F. & H. Club v. Kessler*, 252 Mo. 424; *Bowman Dairy Co. v. Mooney*, 41 Mo. App. 665; *Orpheum Co. v. Brokerage Co.*, 197 Mo. App. 661. (2) The contract sued on is void for want of consideration and want of mutuality. *Hudson v. Browning*, 264 Mo. 58. (3) If the contract sought to be enforced is void, as to the Poultry & Game Company, then there can be no judgment against the sureties. There can be no such thing as a judgment against the sureties where there can be no recovery against the principal. *Kansas City v. O'Connor*, 82 Mo. App. 655; *Tandy v. Commission Co.*, 113 Mo. App. 413; *Building Assn. v. Obert*, 169 Mo. 507; *Railroad v. Smith*, 27 Mo. App. 371; *Brandt on Sur. & Guar.* (3 Ed.), sec. 19, p. 163.

Abbott & Edwards for respondent.

(1) Full performance takes a contract out of the requirements of the Statute of Frauds, and therefore the contract or transactions between the Poultry & Game Company and plaintiff are not affected by the statute because plaintiff performed all of the conditions imposed upon it. *Bless v. Jenkins*, 129 Mo. 657; *Marks v. Davis*, 72 Mo. App. 562; *Smith v. Davis*, 90 Mo. App. 538; *Sloan v. Paramore*, 181 Mo. App. 611; *Ordelheide v. Traube*, 183 Mo. App. 363; *Denny v. Brown*, 193 S. W. (Mo.) 552. (2) There is no want of consideration or mutuality in the contract or transactions between the Poultry & Game Co. and plaintiff out of which the indebtedness secured by the bond arose. R. S. 1909, sec. 2774; *Cold Blast Trans. Co. v. K. C. Bolt & Nut Co.*, 114

Fed. 77, 57 L. R. A. 696; *Wulze v. Shaefer*, 37 Mo. App. 551; 9 Cyc. 329, 333; *Heffernan v. Neumond*, 201 S. W. 645; *Warren v. Coal Co.*, 207 S. W. 883; *Brown Paper Box Co. v. Merc. Co.*, 190 Mo. App. 584; *Stearns on Suretyship* (2 Ed.) secs. 28, 57, pp. 34-67; 12 R. C. L. sec. 29, p. 1077; 20 Cyc. pp. 1415, 1416, par. b.; *Bleeker v. Hyde*, 3 McLean, 279. (3) Where one of the parties to a contract is corporation, the defense of *ultra vires* cannot be maintained against liability on such contract where it has been performed by one party, the contract not being illegal or immoral or expressly prohibited by charter. The party who has performed may sue on the contract the party who received and retained the benefits of his performance thereunder. 5 *Thompson, Priv. Corp.* sec. 6016, p. 4666; 1 *Clark & Marshall, Priv. Corp.* p. 598; *St. Louis Drug Co. v. Robinson*, 81 Mo. 18; *Bank v. Trust Co.*, 187 Mo. 528; *Weyrick v. Grand Lodge*, 47 Mo. App. 391; *Welch v. Heim Brwg. Co.*, 47 Mo. App. 608; *City of Goodland v. Bank*, 74 Mo. App. 365; *Chenoweth v. Pac. Express*, 93 Mo. App. 185; *Smith v. Richardson*, 77 Mo. App. 422; *York v. Farmers' Bank*, 105 Mo. App. 127; *Bush Const. Co. v. Bambrick-Bates Const. Co.*, 176 Mo. App. 608; *St. Louis v. Ry. Co.*, 248 Mo. 10.

JAMES T. BLAIR, J.—Plaintiff is a Wisconsin corporation which formerly brewed and sold beer. Defendant Missouri Poultry & Game Company is a Missouri corporation. In August, 1905, F. W. Brockman went to Milwaukee and orally agreed with plaintiff to purchase beer from it; that he would form a corporation for that purpose; that he would go into the business and finance it, furnish a bond signed by himself and August Gehner, and in due time notify plaintiff when to commence shipping its product. On August 26, 1905, the bond was signed. August 29, 1905, Brockman wrote plaintiff ordering beer, and saying: "You can bill this to me if you prefer until the bond is accomplished or make any other arrangement to please yourself, but the *new company*

will take hold of the business at once." On August 31, 1905, Brockman wrote:

"The bond is already signed by Mr. August Gehner, a capitalist of this city and President of the German-American Bank, and myself as surety for the Missouri Poultry & Game Company, and will be forwarded to you *as soon as we obtain the charter from the State, which we have applied for*, and the only reason that I am not sending it along is because I do not wish to have it returned here or charged, in case the Secretary of State should have some reason or other to make any request for alteration of any of the articles or possibly in the name. At any rate, I stand good for the two cars of beer ordered and for all which will be forwarded by you, and you can take this as your surety."

The bond was sent to plaintiff on September 2, 1905. It reads as follows:

"Know All Men by These Present, That we, Missouri Poultry and Game, Company, a corporation, organized under the laws of the State of Missouri, of St. Louis, as principal, and F. W. Brockman and August Gehner, of St. Louis, Missouri, as sureties, are held and firmly bound unto the Jos. Schlitz Brewing Company, a corporation of Milwaukee, Wisconsin, in the sum of twenty thousand dollars, good and lawful money of the United States, to be paid to the said Jos. Schlitz Brewing Company, its successors or assigns, to which payment well and truly to be made, we do bind ourselves, jointly and severally, our heirs, executors and administrators, firmly by these presents.

"Sealed with our seals and dated this 26th day of August, 1905.

"Whereas, the above bounden principal has agreed to purchase for and during the next ten years from the date hereof, beer brewed by the Jos. Schlitz Brewing Company (a corporation engaged in the manufacture of beer at Milwaukee, Wisconsin), to the exclusion of all other malt beverages, in consideration whereof, said Jos. Schlitz Brewing Company has consented to sell and ship,

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upon the order of said principal, from time to time as needed in his business, its various brands of beer in conformity to the by-laws, rules and regulations established in that behalf and printed on the back hereof, and at the following prices, to-wit: As per special agreement, and to extend to said principal on such purchases a running credit not exceeding \$10,000, as long as all purchases in excess of said credit are promptly paid, and the above bounden purchaser, complies with all of his obligations in the premises, the above named obligee having reserved the right to change any or all of the prices aforesaid, from time to time, without notice, to the principal or the sureties; also the right of terminating the aforesaid agreement to sell beer to said principal, without notice, at any time prior to the termination of said period of ten years, and whereupon all amounts then owing from said principal to said obligee shall become due and payable forthwith; and further, reserving the privilege of extending to said principal a running credit in excess of said sum of \$10,000 dollars and of extending at any time or times to said principal, credit in excess of said sum, all without releasing or discharging thereby the above named sureties from the obligations of this bond:

“Now, Therefore, the condition of this obligation is such that if the above bounden principal, his heirs, executors or administrators shall faithfully comply with said agreement and shall well and truly pay or cause to be paid to the above named Jos. Schlitz Brewing Company, its successors or assigns all sums of money which may or shall be owing to said Jos. Schlitz Brewing Co., at the time or times when the same shall become payable, according to the agreement aforesaid, and the regulations endorsed on the back hereof, without fraud or delay, then this obligation to be void, otherwise to be and remain in full force and virtue; it being expressly understood that the above named sureties shall, under all circumstances, be liable to the obligee for so much of the indebtedness of the principal as is not in excess of the amount of this obligation, but no more, and that the discharge of

this obligation shall not release the principal from the payment of any indebtedness due from him to the obligee in excess of such amount."

The by-laws, rules, etc., referred to in the bond stated the authority of agents, provided that no order or agreement for the purchase of beer would be binding until received and accepted by plaintiff at Milwaukee; prescribed credits for returned containers and certain terms of sale, other than prices. The "special agreement" referred to in the bond fixed the prices to be charged and paid for beer. These prices were proved orally. Beginning with the order referred to, the Poultry & Game Company, of which Brockman became the president, ordered from plaintiff large quantities of beer which it received and sold. The business was continued on a large scale for nearly six years and was terminated by plaintiff by a notice of which no complaint is made. At the time of the termination of the arrangement there was due plaintiff, according to the agreed price, the amount for which it recovered judgment, \$9472.50.

Several grounds are relied upon for reversal.

I. The total amount of beer sold to the Poultry & Game Company was very large. The gross amount billed during one month which, it seems, is illustrative of the business done, was over \$14,000. The net price was over \$6300. The balance sued for probably represents the net due for the last few weeks before the notice of termination was given by plaintiff. It is not contended the sale of beer was illegal at that time, nor that it ran counter to the then public policy. It is argued the contract to purchase was *ultra vires* of the Poultry & Game Company. The charter of that company, as incorporated in 1893, disclosed it was then incorporated to deal in dressed poultry, game and country produce. The representation as to the formation of a corporation in 1905 seems to have been untrue. The charter does not expressly invalidate transactions outside the charter powers. [St. Louis Drug Co. v. Robinson, 81 Mo. l. c. 26.]

The contract has been fully executed by plaintiff. The Poultry & Game Company has received and had full benefit of the shipments of beer represented by the sued for balance.

1. With respect to estoppel to plead *ultra vires* to a contract fully executed on one side defendants rely upon the Federal rule, in the main. This court

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and the courts of appeals of this State long since adopted the rule in force in most of the states which we said in *Millinery Co. v. Trust Co.*, 251 Mo. l. c. 579, had been tersely stated by Rombauer, P. J., in *Winscott v. Inv. Co.*, 63 Mo. App. l. c. 369, to be that: "the defense of *ultra vires* is not admissible where the contract has been fully executed on one side, unless it is a contract expressly prohibited by law." Other decisions of like import are: *First National Bank v. Guardian Trust Co.*, 187 Mo. l. c. 522 et seq. and cases cited; *Cass Co. v. Ins. Co.*, 188 Mo. l. c. 13 et seq., and cases cited; *St. Louis v. Railroad*, 248 Mo. l. c. 27; *Kellogg-Mackay Co. v. Havre Hotel Co.*, 199 Fed. l. c. 733, 734, and cases cited; *Fletcher's Cyclopaedia, Corporations*, sec. 1543, p. 2609, et seq.; *L. R. A.* 1917A, p. 749 et seq.; 14A *Corpus Juris*, p. 319, sec. 2169, et seq. The principle extends to executed contracts for the purchase of goods in which the corporation has no charter authority to deal. [*Erb v. Yoerg*, 64 Minn. l. c. 465; *Re Assignment of Pendleton Hardware Co.*, 24 Ore. l. c. 332; *Whitehead v. Am. L. & B. Co.*, 70 N. J. Eq. 585; *Iowa Drug Co. v. Souers*, 139 Iowa, l. c. 79, 80; *Albin Company v. Commonwealth*, 123 Ky. l. c. 305, 306; *Osmer v. Brokerage Co.*, 155 Mo. App. 211; *Vermont Co. v. DeSota Co.*, 145 Iowa, l. c. 494, 495; *Watts Mercantile Co. v. Buchanan*, 92 Miss. l. c. 543, 544; *Wrightsville H. Co. v. McElroy*, 254 Pa. l. c. 429; *Lemmon v. Rubber Co.*, 260 Pa. l. c. 32, 33.]

The Missouri cases cited as supporting a contrary view involved questions concerning the enforcement of executory *ultra vires* agreements and are thereby dis-

tinguished from the instant case. [See, Fishing & Hunting Club v. Kessler, 252 Mo. l. c. 437; Bowman Dairy Co. v. Mooney, 41 Mo. App. l. c. 676.] In Anglo-American Land, M. & A. Co. v. Lombard, 132 Fed. l. c. 741 et seq., the United States Circuit Court of Appeals was considering an executory feature of the contract before it when it discussed the rule in this State. The court said: "Of course, the present question is whether the Missouri Company's acquisition of stock of the Kansas Company and the incurrence of the stockholders' liability which is inseparable from ownership of the stock—a liability which has not been discharged and remains an executory obligation—was void *in toto* or only voidable; in other words, whether the act of a corporation which is not within the scope of its corporate powers, and is therefore prohibited (citations) can have or be given the effect of placing upon the corporation an enforceable executory obligation." (l. c. 742). It is clear this was understood in the case of Millinery Co. v. Trust Co., *supra*, and that the case was not given approval as authority for the broad doctrine it is here contended it announced. In fact, in the Millinery Co. case, the exact contrary was expressly stated to be the rule in this State.

2. It is argued the provisions of Section 9749, Revised Statutes 1919, and Section 7 of Article XII of the Constitution of the State to the effect that "no corporation shall engage in business other than that expressly authorized in its charter, or the law under which it may have been or may hereafter be organized," preclude a holding that defendants are estopped to set up that the contract in this case was *ultra vires* of the Poultry & Game Company. The provisions quoted were in existence at the time the cited decisions of this court were made and the doctrine of estoppel has been applied when the constitutional provision mentioned was before the court. [Summet v. Realty & Brokerage Co., 208 Mo. l. c. 512, 513.] In fact, the violation of some restriction upon the exertion of power by a corporation is the essence of *ultra vires* action. It would be strange if

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this court and the Courts of Appeals would so often apply the doctrine of estoppel in the face of the provisions quoted if their effect is to render that doctrine inapplicable in this State. Such is not the case. The question is one often decided. Those provisions but incorporate the applicable common law, which is that corporations are restricted to the powers given by their charters. The exception to the general rule of estoppel made in case a charter or provision of law "expressly" prohibits the making of a contract by a corporation cannot be grounded upon the common law or provisions declaratory of it, as are those quoted. The question under these same Missouri provisions was discussed by the United States Circuit Court of Appeals for this circuit in *St. Avit v. Kettle River Co.*, 216 Fed. l. c. 875, 876, and a conclusion adverse to appellants' present claim was reached.

In *National Bank v. Matthews*, 98 U. S. l. c. 627, the record under review was that of this court in *Matthews v. Skinker*, 62 Mo. 329. In one paragraph of its opinion the Supreme Court of the United States assumed the correctness of the holding of this court that a deed of trust acquired by a national bank by the purchase of the note it secured was thereby brought within Section 5137, U. S. R. S. 1899 (13 Stat. 99), which prohibited a national bank from holding "the possession of any real estate under mortgage," but nevertheless held the debtor could not be heard to say the security was unenforceable because *ultra vires* of the bank. The court cited many authorities and quoted with approval from Sedgwick on Statutory and Constitutional Construction, 73: "Where it is a simple question of authority to contract, arising either on a question of irregularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains." The court pointed out that the statute did not declare the security void; that if it had been intended it should be so, Congress easily could

have said so; that other statutes specifically prescribed forfeitures when it was desired they should result; that the whole statute was to be examined in determining whether a contract in contravention of it was intended to be rendered void. The judgment of this court in that case was reversed.

In Michigan a statute provided that the articles of association should state "the purpose or purposes for which the corporation is formed, and it shall be unlawful for said corporation to divert its operations or appropriate its funds to any other purpose, except as hereinbefore provided." It was held (*Butterworth & Lowe v. Milling Co.*, 115 Mich. 1. c. 3) that a transgression of this prohibition might subject the offending corporation to action by the State "or other appropriate proceeding;" but did not prevent the application of the doctrine of estoppel to contracts *ultra vires* of the corporation.

In Texas a statute provided: "No corporation created under the provisions of this title shall employ its stock, means, or other property, directly or indirectly, for any other purpose than to accomplish the legitimate purpose of its creation." A corporation organized to manufacture and vend cotton and woollen goods loaned money to one Bond and took his note. When sued, Bond pleaded *ultra vires*. After approving the general rule that the execution by one party to an *ultra vires* contract estops the other to plead *ultra vires* as a defense, the court (*Bond v. Mfg. Co.*, 82 Tex. 1. c. 313) dealt with the question of the effect of the quoted statute as follows: "It is true that a distinction is made between the act of a corporation which is merely without authority and one which is illegal. In the one case, it is a question of authority; in the other, of legality. A corporate act becomes illegal when committed in violation of an express statute on a specific subject, or when it is *malum in se* or *malum prohibitum*, or when it is against public policy. [Beach on Priv. Corp. sec. 438; Taylor on Priv. Corp. secs. 293, 295.] If, therefore, the transaction here engaged in by appellee was

not merely beyond its powers but was also illegal, in the sense stated, the contention of appellants should prevail. It will be noted that Article 589 . . . is a general statute. It is merely declaratory of the common law by which corporations are strictly confined in their powers to the limits and fixed purposes for which they were created. The language of the statute at most emphasizes the doctrine of the common law. To such 'general prohibitions against the doing by corporations of acts beyond the scope of the corporate powers, courts appear to give little effect.' [Taylor on Corps. sec. 295; Curtis v. Leavitt, 15 N. Y. 54; Halstead v. Mayor, 3 N. Y. 430-433.] And in many cases (and these in our opinion the most authoritative) when the statute has a specific but at the same time an implied application, the doctrine of estoppel against the beneficiary of an executed contract is not changed." The court cites National Bank v. Matthews as typical of this last-mentioned class. A like holding was made with respect to a similar statute in Harris v. Gas Co., 76 Kan. l. c. 762. The court quoted and approved 1 Clark & Marshall on Priv. Corp. sec. 225b, to the effect that: "A provision in a general corporation law that no corporation created thereunder shall employ its assets for any other purpose than to accomplish the legitimate objects of its creation is merely declaratory of the common-law rule . . . and does not amount to such express statutory prohibition of *ultra vires* loans and other transactions as to render them illegal instead of *ultra vires* merely." In 2 Morawetz on Corporations, sec. 658, it is stated that provisions in charters of corporations and in general laws "prohibiting corporations from exercising any powers except those conferred by their charters" are "merely declaratory of the general common-law prohibition against any exercise of corporate powers which has not been authorized by the Legislature; and there is no reason for supposing that the Legislature intends to give it any greater force or effect than the common-law rule." He points out that statutes of the kind are generally so construed or

"ignored" by the courts. In *Erb v. Yoerg*, 64 Minn. l. c. 465, it was held that one who had sold and delivered goods to a corporation on an *ultra vires* contract could not replevin them since the corporation was estopped to plead *ultra vires* though a statute made an offense of any "diversion of corporate property to other objects than those specified in the articles." While the quoted constitutional provision would prevent any general legislative authorization contrary to its terms, yet its restrictive effect upon corporations is no greater than its language imports when given its ordinary meaning. [Black on Interpretation of Laws (2 Ed.), sec. 11, p. 25; Sedgwick on Constr. Stat. & Const. Law (3 Ed.) p. 19.]

It is argued the decision in *Orpheum Theatre Co. v. Brokerage Co.*, 197 Mo. App. 661, is in conflict with these views. That it contains language apparently justifying such a suggestion cannot be denied. Yet that case involved the enforceability of a voluntary subscription by a brokerage corporation to a theatre corporation to aid in building a home for the latter. The court stated the brokerage company had "no interest in the matter which could be subserved" by the erection of the theatre building. In other words, as held by the Kentucky Court of Appeals in a like case, the brokerage company received no benefit peculiar to it, and therefore had not received anything from the contract which could render applicable the doctrine of estoppel. In so far as the remainder of the opinion in the case cited is concerned it is, if not *obiter*, out of accord with the settled rule in this State. It results that this point is ruled against appellants.

II. The Statute of Frauds has no application. The action is for a balance due for goods actually sold and delivered. Whether or not the contract under which the parties proceeded was obnoxious to that statute by reason that it was not to be performed within a year, the beer for the price of which plaintiff now has judgment was actually received. Plaintiff had fully performed, and the statute is no defense. [*Bless v. Jenkins*, 129 Mo. l. c. 657; *Cole-*

Statute of
Frauds:
Oral Contract.

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man v. Forrester, 178 Mo. App. l. c. 63; Montgomery v. Gann & Mathers, 51 Mo. App. 187; Winters v. Cherry, 78 Mo. 344; Mitchell v. Branham, 104 Mo. App. l. c. 484; Bird v. Bilby, 202 Mo. App. 212; McGinnis v. McGinnis, 274 Mo. l. c. 297.] The action is for the price of goods delivered and received under the oral contract, and the Statute of Frauds is not an answer. [Kratz v. Stocke, 42 Mo. l. c. 358; Smith v. Davis, 90 Mo. App. l. c. 538; Tucker v. Dolan, 109 Mo. App. l. c. 453; 25 R. C. L. p. 707, sec. 351.] The distinction made between part performance and full performance by one of the parties is pointed out in Bird v. Bilby and Tucker v. Dolan, *supra*. The effect of the bond in this case is to guarantee payment of a balance which might become due on a running credit under a contract to furnish beer to the Poultry & Game Company. The furnishing of the credit is the consideration of the bond, and that it is so appears sufficiently in the bond.

III. It is argued the contract is void for want of mutuality. Hudson v. Browning, 264 Mo. 58, is cited. In the contract in that case Hudson, defendant, agreed to receive 200,000 railroad ties. **Executed Contract:** The contract did not obligate plaintiff to **Mutuality.** furnish any number of ties. It was held there was no mutuality and plaintiff could not recover damages for loss of profits. That is not this case. Here, though appellant's view be taken as correct with respect to the contract when first entered into, the subsequent shipments and acceptances made applicable the principle that the act of one party on the faith of the unilateral promise of the other supplies the consideration. [Type-writer Co. v. Realty Co., 220 Mo. l. c. 525, et seq.]

For the reasons given the judgment is affirmed. All concur, except *Elder, J.*, not sitting.

CHARLES DOWNS, Appellant, v. J. E. HORTON et al.

Division One, April 9, 1921.

1. **NEGOTIABLE INSTRUMENTS: Fraud: Evidence.** Evidence which raises a doubt as to a note not being a safe investment because of the risk taken as to the solvency of the makers, must not be taken as equivalent to showing knowledge of fraud in the procurement of the note.
2. ———: ———: **Indorsement Without Recourse.** The fact that the indorser of a note originally tainted with fraud took it indorsed without recourse, is not a badge of guilty knowledge of the fraud on the part of the indorsee. To hold otherwise would be to impair the negotiability of commercial paper.
3. ———: **Proof of Fraud: The Jury.** Notwithstanding the jury are the judges of the credibility of testimony, yet, where in an action by an indorsee of a promissory note against the makers it is admitted that the note was originally tainted with fraud on the part of the payee from whom the indorsee obtained it, the latter may show by oral evidence that he had no notice of the fraud when he took the note, and the jury is not at liberty to disbelieve this evidence if it is uncontradicted, unimpeached and free from impeaching circumstances; and is not at liberty to find that the indorsee had actual knowledge of the infirmity, or of facts which made his taking of the note an act of bad faith within the meaning of Section 10026, Revised Statutes 1909, merely because there is a lack of what the jury deems credible evidence in support of the claim of the indorsee.
4. ———: **What is Proof of Notice.** Under the Negotiable Instrument Act (R. S. 1909, sec. 1026) the duty is devolved upon the holder of a promissory note originating in fraud to prove his good faith and lack of notice of the fraud when he took the note; but in order to constitute notice there must be a finding that he had actual notice of the fraud, or of facts which made his taking of the note an act of bad faith. It is not enough that the facts in evidence raise a suspicion of guilty knowledge, or that the facts known to him would have put an ordinarily prudent man on inquiry.
5. ———: **Statute a Codification of Former Law.** It is generally held that the Negotiable Instrument Law is a mere codification

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of the general law in relation to such instruments. This is certainly true of Section 10029, Revised Statutes 1909, which casts upon the holder the burden of proof of his good faith and lack of notice of the fraud when fraud has been shown in the procurement of the note sued on.

6. ———: **Consideration.** The statute does not make want or failure of consideration unmixd with fraud one of the things proof of which will cast on the holder the burden of proving himself a holder in due course.
7. ———: **Evidence of Notice of Fraud.** It is the law under this act, and was the law before the act was passed, that knowledge of facts which would excite suspicion or put a reasonable man on inquiry, or even negligence, is not sufficient to charge a purchaser of a note with notice of fraud in its origin.
8. ———: **Evidence of Innocence.** Upon proof of fraud or illegality in the creation of a promissory note, an obligation is imposed on the holder to show that he came fairly into possession of it. Evidence that it was taken for value before maturity will not alone meet the requirement. He must show that he had no knowledge or notice of the fraud. Specifically, he must disclose the facts and circumstances under which he acquired it.
9. ———: **Evidence: The Jury.** When the indorsee of a negotiable instrument in an action on it against the makers, has shown that he purchased it for value before maturity in good faith, and has disclosed all the facts and circumstances attending the purchase, and they are all consistent with good faith and negative any notice of the fraud, and no damaging or discrediting circumstances of substantial value are shown, and defendant produces no counter-vailing or impeaching evidence, the jury may not, by disbelieving the plaintiff's evidence, make a finding that after all the plaintiff did have actual knowledge of the fraud, and that there were facts known to him which made his act in taking the note bad faith on his part.
10. **BURDEN OF PROOF: Meaning.** The term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning, or at any subsequent stage of the trial, in order to make or meet a prima-facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence sometimes called the "burden of evidence," passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the

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evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets that obligation upon the whole case he fails. This burden of proof never shifts during the course of the trial.

11. ———: ———: **Distinction.** The phrase "burden to prove" used in the Negotiable Instrument Act, means the "burden of evidence," as distinguished from the "burden of proof" in its strict sense.
12. ———: **Order of Evidence: Directed Verdict.** In an action on a negotiable instrument, where fraud is charged by the answer, it is incumbent on the defendant to first offer evidence of facts tending to show the fraud and nothing more. This raises a presumption which calls upon the plaintiff to disclose the facts which are peculiarly within his knowledge. The plaintiff then gives evidence of all the facts and circumstances under which he acquired the paper, and the presumption takes flight. If the plaintiff's evidence is such that his good faith and want of notice are the only inferences that a fair-minded person could draw from it, it then devolves upon the defendant to prove specific facts tending to show plaintiff's actual knowledge of the fraud or his bad faith. If defendant offers no such evidence, then clearly he has failed to offer any evidence in support of his affirmative defense that plaintiff had notice of the fraud when he took the paper, and the plaintiff is entitled to a directed verdict.

Appeal from Greene Circuit Court.—*Hon. Guy D. Kirby,*
Judge.

REVERSED.

Lamar, Lamar & Lamar for appellant.

- (1) Under the law merchant, which has become a part of the common law, when the defendant makes proof which establishes prima-facie that he is a holder in due course, the burden of proof then shifts back to the defendants to show actual knowledge on the part of the defendant of facts which would destroy his right to recover, and in the absence of such proof by defendants, plaintiff is entitled to a peremptory instruction. *Daniel on Negotiable Instruments* (2 Ed.), sec. 819; 3 R. C. L. sec. 245, p. 1041; 8 C. J. sec. 1295, pp. 988-989; *Johnson v. McMurtry*, 72 Mo. 282; *Henry v. Sneed*, 99 Mo. 422; *Wright Inv. Co. v. Fidelity Co.*, 178 Mo. 80; *Hamilton v. Marks*, 63 Mo. 180.
- (2) The purpose of the Negotiable Instrument Law was

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not to clog and hamper commercial paper, but to facilitate its transfer, and codify and make uniform the established rules of law, and this section did not change any rule as to proof, or the burden of proof, or the burden of evidence. Brannan on Negotiable Instrument Law (2 Ed.), p. 69; Selover on Negotiable Instrument Law (2 Ed.), p. 1; Ogden, Negotiable Instrument Law, pp. 253, 256; Crawford on Negotiable Instrument Law, p. 5; Bunker on Negotiable Instrument Law, pp. 1, 5; 8 C. J., sec. 1291, p. 983; German Am. Bank v. Lewis, 63 So. (Ala.) 743; Fisk Rubber Co. v. Parker, 170 Pac. 581; Sisk v. Meager, 73 Atl. 785; Campbell v. National Bank, 126 S. W. 114; Metropolitan Co. v. Folden, 180 S. W. 985; German Am. Bank v. Lewis, 66 So. 509.

Hiett & Scott and Roscoe C. Patterson for respondents.

RAGLAND, C. This case comes to us upon certification by the Springfield Court of Appeals. The opinion written by the presiding judge of that court, in which both of his associates concurred, is as follows: "This is a suit on a promissory note given by defendants to T. P. Tuck & Company in payment of a horse. The plaintiff sues as a purchaser for value of said note and, having lost in the trial court, appeals the case here claiming to be an innocent purchaser for value.

"The horse in question was purchased by defendants who were farmers living near Mountain Grove, Missouri, for breeding purposes, each defendant purchasing one or more shares in the horse but giving a joint note. The pleadings in the case are so framed that defendants charged in their answer and plaintiff admitted by reply that this note was procured by fraud, the fraud being that the agent of Tuck & Co. gave two or three prominent farmers or stockmen without consideration an interest or share in the horse for the purpose of representing, as he did represent to defendants, that such persons were purchasers of such shares for cash, thereby inducing these defendants to believe that such prominent farmers and stockmen were

joint purchasers of the horse with them. The nature of the fraud perpetrated and admitted will be fully seen by reference to the case of Ozark Motor Co. v. Horton, 196 S. W. 395.

"The sole issue is whether the plaintiff is a holder in due course as defined by the Negotiable Instrument Law, Section 10022, Revised Statutes 1909, in which case the defense of fraud is not available. The title of Tuck & Co. who negotiated this note to plaintiff being admitted to have been defective, the burden was cast on and assumed by plaintiff to prove that he acquired the title as holder in due course as provided by Section 10029, Revised Statutes 1909.

"The plaintiff's evidence is to this effect: The note is dated July 18, 1911, due October 1, 1915, at seven per cent interest, payable annually. Plaintiff purchased this note and another from T. P. Tuck June 26, 1912. Plaintiff was then a banker at Carl Junction, Jasper County, where he had lived many years and had previously been in the mercantile business. He became acquainted in a business way with T. P. Tuck in 1911. Tuck then and thereafter lived in Springfield, Mo., and was engaged in selling imported stallions. Tuck desired to have plaintiff or his bank handle some of his commercial paper and at that time offered to sell plaintiff a note on some parties in Arkansas. Plaintiff wrote to the Bank of Greene County at Springfield, getting the name of this bank from a bank directory, as to Tuck's financial and business standing. This bank replied that Tuck was not one of its customers and it had no 'line on him,' and referred plaintiff to the State Savings Bank of Springfield. Replying to plaintiff's inquiry the cashier of this bank said Tuck was worth from \$6,000 to \$10,000 and 'concerning the financial responsibility, etc., of Mr. T. P. Tuck of this city, beg to say that I have had considerable business dealings with Mr. Tuck in the last seven years, and I have always found him to be absolutely reliable and honest in all dealings I have had with him.'

"This was in August, 1911, and after further inquiry plaintiff bought the Arkansas note which was later

paid. In January, 1912, Tuck offered to sell plaintiff or his bank the present note. The plaintiff then wrote a letter of inquiry to the First National Bank of Mountain Grove as to the financial responsibility, integrity, etc., of the makers of this note, these defendants. This bank replied by its cashier not unfavorably but somewhat indefinitely. Not being altogether satisfied plaintiff wrote a similar inquiry to E. H. Farnsworth, an attorney at Mountain Grove, who replied giving the property and worth of each of the defendants in detail, the purport being that two of the makers are "all O. K." being worth \$3,000 to \$5,000 above exemptions, others worth less but "considered good," "honorable and industrious," etc. Another letter of inquiry was sent to and answered by J. M. Hubbard, president of the First National Bank at Mountain Grove, in which he was asked in confidence as to the financial standing of each maker of the note and his "candid opinion of the loan as an investment." His answer is that he would have loaned each maker his proportional part of the note and "they are all good farmers and part of them are patrons of this bank. Now I consider each separately good for his proportionate part, but I don't consider either one single good for the whole amount, for they are not able or worth the amount, but each is good for his proportionate part at this time and I hope the future will prove a verification of these indications.'

"This note was then three months old; that plaintiff stated that he understood it was given in part payment of a horse and no intimation is made by any of these persons that anything is wrong with the note or that any party thereto was thinking of contesting it. It is not shown when the defendants discovered the fraud of which they complain but neither the bank officers nor Mr. Farnsworth, living in the same neighborhood, indicated that they had then heard of anything wrong. It is true that J. H. Hubbard is one of the parties who had been given a share in the horse (plaintiff not knowing this however) and he might be friendly to Tuck but not so of the others.

"The plaintiff did not buy the note at this time and in May, 1912, Tuck again offered him this note and a Texas note in a letter saying: 'As to the Mountain Grove notes I would endorse them as I am confident they are all O. K. The horse is doing extra good and they are extremely well satisfied with him and that is the keynote to horse paper. That alone makes it good when everything else fails. The Texas paper is strong enough that collection can be forced on it. I would consider it quite an accommodation and a personal favor if you could place these two sets of notes for me.'

"The plaintiff then bought the notes mentioned, the face value of which aggregated \$1626.68, and paid therefor \$1586.68. His profit was \$40 and the accrued interest not then due. There is no question as to plaintiff having paid this amount for these two notes as this was proven not only by plaintiff but by documentary evidence. The Texas note was later paid without trouble. The notes in question were assigned to plaintiff 'without recourse' as Tuck stated that he did not and would not endorse any of the paper sold by him. There was a credit on this eight hundred dollar note of \$266 made on the same date as the date of the note of which plaintiff knew when it was first offered to him, but nothing was said as to this credit and plaintiff made no inquiry as there was nothing unusual. The plaintiff testified positively that when he bought the note he had no knowledge or information or even suspicion of any fraud in its procurement.

"The defendants offered no evidence, except some of the defendants testified that *they* had never paid anything on the note. The defendants state the facts most favorably to them in these words: 'The plaintiff purchased the notes, amounting to one-third of all he had, on statements from men that knew the makers of the notes and which statements the plaintiff himself in his letter to J. M. Hubbard said would lead him not to consider the notes and took them from Tuck endorsed without recourse, when Tuck before had written him that he would endorse them; took them endorsed without recourse by a man that he believed

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to be solvent; took them on men that lived one hundred and seventy miles from him and men that he had not heard of prior to the purchase of notes; did not *know* whether they were farmers or not, whether they were worth a thousand dollars or nothing, and whether they existed or not and endorsed by the only man he believed to be solvent without recourse.'

"The evidence has been set out at some length to see if there is any substantial evidence justifying a finding on the evidence that plaintiff had actual knowledge of the fraud in procuring the note or had knowledge of such facts that his action in taking the note amounted to bad faith, as that is the only question in the case. This question we think is wholly apart from any suggestion that plaintiff acted with poor business judgment in buying a note on the representation made to him and with no actual knowledge as to the financial worth or integrity of the makers. Evidence which raises a doubt as to a note not being a safe investment because of the risk taken as **Fraud.** to the *solvency* of the makers must not be taken as equivalent to showing knowledge of fraud in the procurement of the note. The price paid is so nearly equal to the full value of the note that no point is made as to that indicating fraud, but on the contrary it is a strong argument of the purchaser's good faith. It is seldom that a man, who is anxious to rid himself of a note because of his fraud in procuring it, can sell it to another, who knows such fact, for full value.

"The fact that plaintiff took the note endorsed without recourse by the payee is not a badge of guilty knowledge of the fraud. To hold that a transfer in that manner casts suspicion on the title of the holder is to impair the negotiability of commercial paper. [Mayes v. Robinson, 93 Mo. 114, 122; 4 Ency. Law (2 Ed.) 273; 7 Cyc. 809; Leavitt v. Thurston, 113 Pac. 77, 38 Utah, 351; Kelley v. Whitney, 30 Amer. St. 697, 45 Wis. 110; Bank v. Hatcher, 66 S. E. 308, 151 N. C. 359; Borden v. Clark, 26 Mich. 410; Page v. Ford, 131 Pac. 1013, 65 Ore. 450; Stevenson v. O'Neal, 71 Ill. 314; Hatch v. Barrett, 34 Kan. 223, 8 Pac. 129.]

"It appears, therefore, that considering the evidence as it is in the record, there is no substantial evidence showing that plaintiff was other than a holder in due course, that is, took the note in good faith and for value before maturity and without notice of any defect in the title as defined by Sections 10025 and 10026, Revised Statutes 1909.

"The question arises then, and the able briefs discuss this question only, whether plaintiff's guilty knowledge is shown or may be inferred from the *lack* of credible evidence on plaintiff's part showing the

**Guilty
Knowledge.**

contrary, the jury being the sole judges of such credibility. This question arises on the rule of law, codified by the Negotiable Instrument Law, Section 10029, that when fraud or other such infirmity in the note is shown, then the burden is cast on the plaintiff as holder to prove himself a holder in due course. The concrete question is whether a plaintiff, as holder of the note by assignment, can, in case it turns out the note was originally tainted with fraud, in any case by oral evidence (and such his evidence must generally be in whole or in part) discharge this burden of proof so as to entitle him to a verdict; or may the jury in all cases more or less arbitrarily disbelieve the plaintiff's evidence, though uncontradicted and unimpeached and free from impeaching circumstances, and from *lack* of what it deems credible evidence to the contrary find that plaintiff had actual knowledge of the infirmity or knowledge of facts which made his taking the instrument an act of bad faith as required by Section 10026, Revised Statutes 1909. It would appear from a reading of this section that, notwithstanding Section 10029 casts the burden of proof on plaintiff to prove his good faith and lack of notice of the fraud on purchasing the instrument, yet in order to constitute notice of the fraud there must be a finding that plaintiff had *actual* knowledge of the fraud or of facts which make his taking the instrument an act of bad faith; and it is not sufficient to defeat plaintiff that the facts in evidence raise a suspicion of guilt.

knowledge or that the facts known to the plaintiff would have put an ordinary prudent man on inquiry. It seems illogical to hold that mere disbelief of positive testimony showing innocence should be more potent in this respect than belief of facts in evidence exciting suspicion and putting a prudent man on inquiry.

"It is generally held that the Negotiable Instrument Law, including the sections just referred to, is a mere codification of the general law on that subject. [3 R. C. L. sec. 31, p. 853; Ogden on Neg. Instruments, 253 and 256; Crawford on Neg. Instruments (3 Ed.), p. 5; Selover, Negotiable Instruments (2 Ed.), p. 1.]

"Corpus Juris, vol. 2, sec. 1291, p. 983, speaking of our Section 10029, Revised Statutes 1909, says: 'This provision, as far as shifting the burden on to the holder is concerned, has been applied in many cases, but is merely declaratory of the common law.' The cases cited support this statement. [See, also, Link v. Jackson, 158 Mo. App. 63, 139 S. W. 588.] Of course the ruling of a particular court on some particular phase of the law may be found out of harmony with the general law and in conflict with the codification of the same in the Negotiable Instrument Act, but rarely, if at all, will such act be found to have changed the general law of Negotiable Instruments.

"Certain it is that Section 10029, Revised Statutes 1909, enacted in 1905, casting the burden of proof on the holder to prove his good faith and lack of notice of the fraud when fraud has been shown in the procurement of the note, is a codification of and in accordance with the law of this State as previously established. [Hamilton v. Marks, 63 Mo. 167, 178; Hahn v. Bradley, 92 Mo. App. 399, 404; Bank v. Hammond, 124 Mo. App. 177, 180, 101 S. W. 677; Bank v. Hammond, 104 Mo. App. 403, 409, 79 S. W. 493.]

"This court fell into error by holding that the Negotiable Instrument Act changed the general law by

Consideration. including want or failure of consideration unmixed with fraud as one of the things the proof of which cast on the holder the burden of proving himself a holder in due course. [Bank v. Mills, 143 Mo. App. 265, 127 S. W. 425; Bank v. Dowler, 163 Mo. App. 65, 70, 145 S. W. 843.] Such error was corrected, however, in Hill v. Dillon, 176 Mo. App. 192, 209, 161 S. W. 881, and in Bank v. Wood, 189 Mo. App. 62, 173 S. W. 1093, and the law declared as it had been before the codification was adopted as shown by Hahn v. Bradley, 92 Mo. App. 399, 404.

“It is equally true that Section 10026, Revised Statutes 1909, declaring that the notice of fraud in procuring the note which will defeat a holder for value before maturity must amount to actual knowledge of the fraud or knowledge of facts showing bad faith in taking the note, is likewise a codification of the prior law on that subject, and it is now the law and was before the Negotiable Instrument Act was adopted in 1905 that knowledge of facts which would excite suspicion or put a reasonable man on inquiry or even negligence is not sufficient to charge a purchaser of a note with notice of the fraud. [Hamilton v. Marks, 63 Mo. 167; Hayes v. Blaker & Co., 138 Mo. App. 24, 29, 119 S. W. 1004; Mayes v. Robinson, 93 Mo. 114, 5 S. W. 611; Jennings v. Todd, 118 Mo. 296, 24 S. W. 148.] In the Mayes case it is said: ‘*Mala fides* alone can open the door to such inquiry. Gross negligence, even, is not sufficient; actual notice of the facts which impeach the validity of the note must be brought home to the holder. [Johnson v. McMurry, 72 Mo. 278.]’

“ ‘Knowledge of facts which would put a prudent man on inquiry is not sufficient to affect the title of an indorsee of a negotiable instrument purchased before maturity. Nothing short of actual knowledge or bad faith will defeat his title.’ [Bank v. Hammond, 104 Mo. App. 403, 409, 79 S. W. 493.] That when the evidence is all before the court there must be substantial evidence and not a mere lack of it by disbelieving plaintiff’s evi-

dence is clearly shown by *Wilson v. Riddler*, 92 Mo. App. 335, 339, holding that: 'The finding against plaintiff on this branch of the case cannot be permitted to stand without overturning well-settled principles of law governing commercial paper. A purchaser of such paper may have cause for suspicion of defect of title in the holder; he may be negligent, or he may have knowledge of circumstances that would arouse the suspicion of a prudent man and put him on inquiry for further information; yet, in the absence of bad faith, his title will be upheld.'

"The law is the same in this respect since the adoption of the Negotiable Instrument Law. [*Link v. Jackson*, 158 Mo. App. 63, 81, 139 S. W. 588; *Bank v. Railroad*, 172 Mo. App. 662, 676, 155 S. W. 1111; *Reeves v. Letts*, 143 Mo. App. 196, 199, 128 S. W. 246.]

"We fully agree that the Negotiable Instrument Act, Sec. 10029 places on plaintiff, in cases where the note is obtained by fraud, the burden of proving all the facts making him a holder in due course as defined by Sec. 10022, and this includes his good faith and his having no notion of any infirmity or defect of title. While some courts have held that proof by plaintiff of his purchase for full value before maturity is alone sufficient to make him, *prima-facie* at least, a holder in due course, such is not the rule under the Negotiable Instrument Act.

"In 1 *Daniel on Negotiable Instruments* (6 Ed.), sec. 819, p. 979, speaking of the Negotiable Instrument Act, it is said: 'In accordance with what is considered as the effect of the statute, it has so far been generally held that on a showing of fraud on the part of the payee . . . the plaintiff must sustain the burden of proof that he is not only a holder for value and before maturity, but also without notice. This seems clearly to be required by the statutory definition of "a holder in due course."' "

"In *Ruling Case Law*, vol. 3, sec. 245, p. 1040, it is said: 'A broader view, and it would seem a better one, is that, upon proof of fraud or illegality, an obligation

is imposed on the plaintiff to prove that he came fairly into possession of the instrument under such circumstances as entitle him to recover. Evidence that the note was taken for value before maturity will not meet the requirement. The plaintiff cannot prove himself a bona fide purchaser of the note merely by showing that he paid value for it before maturity. He must go further, and show that he had no knowledge or notice of the fraud. Specifically he must disclose the facts and circumstances under which he acquired the paper.' This we think is good law and fully supported by the authorities.

“The next question arises whether after plaintiff has gone forward and shown his purchase for value before maturity in good faith and disclosed all the facts and circumstances attending his acquisition of the note, all of which are consistent with good faith and negative any notice of the fraud and no damaging or discrediting circumstances of substantial value are shown and defendant produces no countervailing or impeaching evidence, may the jury yet by *disbelieving* plaintiff's evidence make a finding that after all plaintiff did have actual knowledge of the fraud and that there were facts known to him which made his act in taking the note bad faith on his part. Is not such a verdict unsupported by any substantial evidence? Answering this Ruling Case Law, vol. 3, sec. 245, p. 1041, says: ‘While it must not appear from his own case that he was chargeable with notice, yet the ultimate fact that he had actual notice must be proved by the opposite party. The rule requires only that the party disclose the facts and circumstances attending the transfer of the instrument; if from this evidence it appears that he had no knowledge or notice, he has satisfied the requirement. The ultimate burden of proof as to good faith rests, it is understood, upon the defendant, inasmuch as he is the party setting up that fact; and the evidence being balanced upon the question at the conclusion of the case, the plaintiff is entitled to recover.’ The cases cited support this view.

Substantial
Evidence.

Downs v. Horton.

“Unless the Negotiable Instrument Act has changed the law in this respect such is the law in this State. It has been repeatedly held that when plaintiff’s evidence discloses all the facts and shows all the elements constituting him a holder in due course, discloses no damaging or impeaching facts and is uncontradicted, then he is entitled to recover. [Johnson v. McMurry, 72 Mo. 278; Henry v. Sneed, 99 Mo. 407, 422, 12 S. W. 663; Wright Inv. Co. v. Frisco Realty Co., 178 Mo. 72, 80, 77 S. W. 296; Langford v. Varner, 65 Mo. App. 370, 374; Jones v. Burden, 56 Mo. App. 199.]

“In Leavitt v. Taylor, 163 Mo. 158, 170, 63 S. W. 385, this is said:

“ ‘It is well settled that mere suspicion alone that a negotiable note is without consideration, or was obtained by fraud, brought home to the transferee before he acquires the note, will not be sufficient to defeat a recovery upon the note by him, but in order to do so, actual notice of the facts which impeach the validity of the note must be brought home to him. [Mayes v. Robinson, 93 Mo. 114; Inv. Co. v. Vette, 142 Mo. 560.] This is exactly the meaning of Section 10026, Revised Statutes 1909.’

“In Hayes v. Blaker, 138 Mo. App. 24, 119 S. W. 1004, this appears: ‘When proof is made that the holder received the paper before maturity in good faith for a valuable consideration, the burden devolves on the maker to prove the holder had actual notice of the specific fact which originally would affect the validity of the paper. [Johnson v. McMurry, 72 Mo. 278.] Such notice needs not be established by direct proof but may be inferred by the triers of fact from facts and circumstances, but it should not be inferred in law from facts and circumstances of a nature to put a prudent man on inquiry.’ This is the law generally. [8 C. J. sec. 1295, p. 989.]

“It will be noted that the adjudged cases and text writers frequently use the expression that ‘the burden of proof again shifts to the defendant’ when the plaintiff has successfully shown himself a holder for value, but this is somewhat inaccurate. A better theory is

that when it is shown that the note has been in guilty hands the law *presumes* that it remains in such hands until the holder, because of having peculiar knowledge of the facts, rebuts such presumption by disclosing his knowledge of the facts. [Hamilton v. Marks, 63 Mo. 167, 178.] This presumption like all presumptions disappears in the light of the facts, and when plaintiff has disclosed the facts within his knowledge the defendant may put in his evidence if desirable, and then, all the evidence being in, the case goes to the jury only in case there is substantial evidence or reasonable inference therefrom supporting the theory that plaintiff had actual knowledge of the fraud or such facts that his action in taking the instrument amounted to bad faith. This is not a case where the plaintiff by reason of the jury discrediting his evidence fails to prove essential facts of his case. It arises on making good an independent affirmative matter of rebuttal arising in the reply to the defense of fraud. [Taylor v. Telegraph Co., 181 Mo. App. 288, 298, 168 S. W. 895; Hurek v. Railroad, 252 Mo. 39, 47, 158 S. W. 581.]

“The judges and text-writers had constantly used the term ‘burden of proof’ and ‘shifting of the burden of proof’ back to defendant in discussing this subject, and there is no reason to say, as intimated in Link v. Jackson, 158 Mo. App. 63, 86, 139 S. W. 588, that any other or different meaning was intended when codifying the general law into the Negotiable Instrument Act.

“This is contrary to the ruling of this court in several cases where it is in effect held that no matter how strong plaintiff’s evidence makes a case showing him to be a holder in due course and defendant introduces no evidence, yet the evidence being oral, the question is one for the jury who may without cause disbelieve plaintiff’s evidence and find for defendant. [Link v. Jackson, 158 Mo. App. 63, 86, 139 S. W. 588; Hill v. Dillon, 151 Mo. App. 86, 131 S. W. 728; Johnson County Sav. Bank v. Mills, 143 Mo. App. 265, 269, 127 S. W. 425.]

"Such ruling it seems overlooks the fact that the note itself makes a prima-facie case for plaintiff, and by Section 10029 the burden is only placed on plaintiff to overcome the prima-facie defense arising from fraud in procuring the note. This question arises on facts presented in plaintiff's reply and is different from plaintiff's failure to prove the facts of his petition necessary to constitute a cause of action. This ruling also ignores the requirement of Section 10026 that when all the evidence is in the defense of fraud must fail unless it is shown that plaintiff had actual notice of the fraud or of facts making his purchase of the note an act of bad faith.

"In *Bank v. Railroad*, 172 Mo. App. 662, 677, 155 S. W. 1111, the court quotes Section 10026 and adds: 'A mere suspicion of such infirmity or defect, or knowledge of facts which would ordinarily put one on inquiry, is not sufficient; it must appear that the holder had actual knowledge thereof.' The court there held that there was nothing to submit to the jury, as it did in *Reeves v. Letts*, 143 Mo. App. 196, both cases arising under the Negotiable Instrument Act.

"In *Johnson v. Grayson*, 230 Mo. 380, 400, 130 S. W. 673, speaking of notice of infirmities in the note sued on the court said: 'There was nothing in the testimony that showed actual knowledge, and the burden was on *defendant* to show he had actual knowledge. [*Leavitt v. Taylor*, 163 Mo. 158; *Brown v. Hoffelmeyer*, 74 Mo. App. 385; *Wilson v. Riddler*, 92 Mo. App. 335.]' The full meaning of this will be shown by the cases cited. In remanding that case the court said: 'However, if on a retrial the evidence to show plaintiff's actual knowledge of a lack of consideration is no stronger than it was at the former trial, then this question should not be submitted to the jury, for it was not sufficient to overcome plaintiff's prima-facie case on the point of consideration.'

"In *Hill v. Dillon*, 176 Mo. App. 192, 200, 161 S. W. 881, this court recognized the rule of law stated but held that the statute, Negotiable Instrument Act, has changed

this rule. This we think is error since the former decisions in this state were in accord with the general law and the Negotiable Instrument Law merely codifies such law.

"We therefore disapprove of the cases of *Link v. Jackson*, 158 Mo. App. 63, and *Hill v. Dillon*, 151 Mo. App. 86, and kindred cases in so far as they hold that in cases where the note is obtained by fraud the plaintiff as holder cannot by verbal evidence, unimpeached and uncontradicted, make a case of his being a holder in due course strong enough to warrant a directed verdict for him.

"We now hold that the law as declared by the Negotiated Instrument Act is the same in this respect as it was before such act and as declared in: *Wright Inv. Co. v. Friscoe Realty Co.*, 178 Mo. 72, 80, 77 S. W. 296; *Leavitt v. Taylor*, 163 Mo. 158, 170, 63 S. W. 385; *Henry v. Sneed*, 99 Mo. 407, 422, 12 S. W. 663; *Hayes v. Blaker & Co.*, 138 Mo. App. 29, 119 S. W. 1004, and kindred cases.

"We also call attention to the fact that there are many cases not involving the Negotiable Instrument Law where it is held that an affirmative defense, as to which the burden of proof is on defendant, may be made sufficiently strong by clear and unequivocal verbal evidence that if same is not contradicted or impeached the court will direct a verdict for defendant. [*Guffey v. Ry. Co.*, 53 Mo. App. 462, 465; *Moore v. Tel. Co.*, 164 Mo. App. 165, 148 S. W. 157; *Rubeotton v. Western Union Tel. Co.*, 194 Mo. App. 234; *Bank v. Hainline*, 67 Mo. App. 483, 487; *Morgan v. Durfee*, 69 Mo. 469, 475.] Many others might be cited. The latest case by the Supreme Court is *Guthrie v. Holmes*, 272 Mo. 215, 233, 198 S. W. 854.

"There are many cases from other states upholding this view of the law which are cited in appellant's able brief and will be cited in the notes of the Reporter, but which we need not now discuss.

"This case should be reversed and remanded and in so holding we are in accord with *Reeves v. Letts*, 143 Mo. App. 196, 199, 128 S. W. 246, and *Bank v. Railroad*, 172 Mo. App. 662, 676, 155 S. W. 1111.

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"We are in apparent conflict, however, with *South-west Natl. Bank v. House*, 157 S. W. 809, by the *Kansas City Court of Appeals*, which we said in *Hill v. Dillon*, 176 Mo. App. 199, overrules *Reeves v. Letts* by the same court. We are also in conflict with *Hammond v. Bank*, 124 Mo. App. 177, by the *St. Louis Court of Appeals*. It is highly desirable that this question be finally settled, for if all such cases when based on oral evidence must go to the jury who are the sole judges of the credibility of the witnesses and the weight to be given to their evidence, then there is never any need to go through the evidence to determine whether there is or not any evidence justifying the finding of actual knowledge or bad faith of the plaintiff. The case is therefore reversed and remanded and certified to the Supreme Court as being in conflict with the cases mentioned."

We fully concur in the conclusions reached by the learned Court of Appeals in the foregoing opinion. The lack of harmony in the decisions which it points out has no doubt arisen out of different interpretations that have been put upon what is now Section 845, Revised Statutes 1919. In construing that section it should be borne in mind that the Negotiable Instrument Law, enacted in 1905, of which it is a part, is just what it purported to be, a codification of the then existing laws relating to negotiable instruments. The language of said Section 845, viz., "when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he . . . acquired the title as holder in due course," is merely declaratory of a rule of law that has been recognized and followed in this State since the decision in *Hamilton v. Marks*, 63 Mo. 167, by this court in 1876. The "burden to prove," which the statute says is on the holder under certain circumstances, is the same burden that was upon him under like conditions before the enactment of the statute. The term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition

**Burden
of Proof.**

or issue by such a *quantum* of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima-facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, sometimes called the "burden of evidence," passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets that obligation upon the whole case he fails. *This burden of proof never shifts* during the course of the trial. [10 R. C. L. 897.] The writer of the opinion in *Link v. Jackson*, 158 Mo. App. 63, 87, says: "Under Section 10029, Revised Statutes 1909 (now Sec. 845, R. S. 1919.)] 'burden of proof,' as therein provided, is used in the strict sense of 'burden of proof,' and not in the sense of 'burden of evidence,'" and he cites *Hamilton v. Marks*, supra, as supporting that proposition. In this we think he was mistaken. *WAGONER, J.*, in the latter case, after an exhaustive review of the American and English cases, adopted this language from *Daniels on Negotiable Instruments* as expressive of the conclusions he had reached:

"There may be, at this juncture, a *shifting of the burden of proof* from the defendant to the plaintiff, for the principle is well established that if the maker or acceptor, who is primarily liable for payment of the instrument, or any party bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument; or if the circumstances raise a strong presumption of fraud or illegality, the owner must then respond by showing that he acquired it bona-fide for the use, in the usual course of business while current, and under circumstances which create no suspicion that he knew the facts which impeach its validity." On both reason and authority it must be held that the "burden to prove" of the statute is the "burden of evidence,"

as distinguished from the "burden of proof" in its strict sense. Let us take a typical case of the class under consideration, where the indorsee sues the maker of a note which had its inception in fraud. The petition alleges the execution of the note and as an affirmative defense the answer alleges the facts constituting the fraud and avers that the plaintiff took the instrument with notice of such facts; reply merely traverses the averments setting up the affirmative defense. The only issue raised on such pleadings is tendered by the answer and the defendant has the affirmative. It, therefore, devolves upon him to show by the greater weight of evidence that the note was obtained by fraud and that plaintiff had actual knowledge of the facts constituting the fraud when he took it, or knowledge of such facts that his action in taking the instrument amounted to bad faith. This obligation, the burden of proof in its primary sense, rests upon the defendant throughout the trial, and if he fails to discharge it, the plaintiff is entitled to recover. [Johnson v. McMurtry, 72 Mo. 278; Johnson v. Grayson, 230 Mo. 380, 400.] That being true, it is incumbent upon defendant to first offer evidence; he thereupon makes proof of facts tending to show the fraud pleaded and nothing more. This evidence does not establish or tend to establish any specific fact showing that plaintiff had knowledge of the fraud; it merely raises a presumption in lieu of the fact and the presumption calls upon plaintiff to disclose the facts that are peculiarly within his knowledge. The plaintiff then gives in evidence all the facts and circumstances under which he acquired the paper and the presumption takes flight. Let it be assumed that plaintiff's evidence is such that his good faith and want of notice is the only inference that a fair minded person could draw from it, it then devolves upon defendant, under the burden of proof resting generally upon him, to prove specific facts tending to show plaintiff's actual knowledge of the fraud or his bad faith. Let it be further assumed that defendant offers no such evidence, then clearly he has failed to offer *any* evidence in

support of his affirmative defense that *plaintiff had notice of the fraud when he took the paper*, and the plaintiff on the pleadings is entitled to a directed verdict. In this hypothetical case, the defendant to begin with had both the burden of proof and the burden of evidence; he introduced evidence tending to show that the note was obtained by fraud; this evidence created a presumption that the plaintiff as holder had notice of fraud; the burden of evidence then shifted to plaintiff who gave evidence which entirely destroyed the presumption; the presumption being gone the burden of evidence shifted back to defendant who, in his efforts to bring home to plaintiff notice of the fraud, was then in exactly the same position as he was before he offered any evidence at all. Consequently there was no evidence to take him to the jury.

The principles governing the shifting of the burden of evidence during the progress of a trial, by reason of the presumptions that rise and disappear as the evidence goes forward, are not peculiar to suits on negotiable instruments. They are of general application. [Guthrie v. Holmes, 272 Mo. 215, 233, 234; Hurck v. Railroad, 252 Mo. 39, 48; Taylor v. Telegraph Co., 181 Mo. App. 288, 298.]

Guthrie v. Holmes, *supra*, is fairly illustrative. It was a suit for damages against the owner of an automobile, for personal injuries due to negligent driving of the car by the chauffeur in the absence of the owner. The sharply contested issue was whether at the time of the accident the chauffeur was acting within the scope of his employment. Plaintiff had the affirmative of this issue and put on evidence showing that the defendant was the owner of the car and that the chauffeur was in his general employment. Defendant then introduced evidence tending to show that the chauffeur was out on a mission of his own—a drunken joy ride—when he ran the plaintiff down. Plaintiff offered no substantial evidence in rebuttal. It was held that the evidence offered by plaintiff in chief raised a presumption that the chauffeur

feur at the time of the accident was within the scope of his employment. It was further held that defendant's evidence destroyed this presumption and the burden then shifted to plaintiff requiring him to make positive proof that the chauffeur was at the time engaged in the owner's business, and that having failed to make such proof the verdict should have been directed for defendant.

In the instant case the answer averred that the note in suit was obtained by the person who negotiated it through fraud and that plaintiff had notice thereof when he took it. The reply admitted the procurement by fraud, but denied the notice. The presumption, however, that arose from the admitted facts was in no way different from the one that would have arisen from evidence tending to prove those facts, and it was completely destroyed by plaintiff's evidence. It is fully set out and carefully analyzed in the opinion of the Court of Appeals. All reasonable minds would agree that no inference could be drawn from it that plaintiff had knowledge of the fraud, or that he acted in bad faith in taking the note. Defendant then failing to make proof of specific facts tending to show fraud or bad faith, the court should have directed a verdict for the plaintiff.

The judgment is reversed and the cause remanded with directions to the trial court to enter judgment for plaintiff as prayed in his petition. *Brown and Small, CC.*, concur.

PER CURIAM:—The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court. All of the judges concur.

JOSEPH D. BONANOMI, Appellant, v. WILLIAM
PURCELL et al.

JOSEPH D. BONANOMI v. WILLIAM PURCELL
et al.; WILLIAM PURCELL, appellant.

Division One, April 9, 1921.

1. **APPEAL.** An appeal cannot be taken from an order overruling plaintiff's motion for a new trial and to set aside an involuntary nonsuit taken by him as to a certain defendant. Such an order is not a final judgment.
2. **CONTRIBUTORY NEGLIGENCE.** Even where the defendant is guilty of acts of negligence which furnish the opportunity of plaintiff's injury, still if plaintiff is guilty of reckless acts which are the immediate cause of his injury he cannot recover damages for it.
3. **COMMERCIAL INTERCOURSE: Invitation to Enter Premises: Necessary Care.** One merchant dealing with another has a right to go upon the premises of the latter by virtue of the invitation implied from commercial intercourse, and the latter assumes to use ordinary care for the safety of his visitor. This degree of care is measured by the standard of the statutes as well as the common law. If some of the precautions prescribed by them are neglected, it is still incumbent upon the visitor to give ordinary care and attention to his own safety as affected by the conditions which lie openly before him, and this care is also measured by the law.
4. ———: ———: ———: **Case Adjudged.** Defendant occupied a store at the corner of two streets, with a main entrance from one street at the first floor, and another entrance from the other street leading into the basement of the building. The plaintiff, a business man of large experience and familiar with such establishments, called upon defendant at his store to negotiate an arrangement for the removal of certain leather in rolls belonging to plaintiff's firm which was in this store. Defendant consented to the arrangement and invited the plaintiff to go down into the basement where the leather was kept. Plaintiff, defendant and an employee went together, descending by an elevator. At the basement floor they alighted, leaving the elevator standing in the shaft. There were no lights in either the elevator or the basement, and the place was

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very dark. The entrance to the elevator shaft at this floor was provided with a double door, one-half of which was gone, so that there was an open space about two feet wide looking into the shaft and wholly unguarded. A city ordinance required this shaft to be guarded and the elevator to be lighted. When the party left the elevator, defendant opened the door leading to the side street and plaintiff then took his stand on the street in the daylight and received and counted the rolls of leather as they were brought out of the basement. Defendant left him thus engaged, went out through the side door, up the sidewalk, and around the corner of the building, a total distance of about fifty feet, to the main entrance to the first floor. Plaintiff remained at his work until it was completed, about an hour and a half, when he said to the employee, "Let's go up stairs," and without waiting for an answer walked out of the light into the basement and toward the elevator shaft where it was so dark that only a dim outline of the shaft could be seen, but he did see the two-foot opening out of which they had come when they descended. Without any invitation to enter or appearance to indicate that the elevator was still standing where they had left it an hour and a half before, he walked into the shaft and fell to the bottom, ten or twelve feet below. *Held*, that he could not recover for the consequent injuries.

Appeal from St. Louis City Circuit Court.—*Hon. Moses Hartmann*, Judge.

REVERSED AND REMANDED.

Jones, Hocker, Sullivan & Angert and *Ernest A. Green* for plaintiff.

The trial court did not err in granting plaintiff a new trial and setting aside the involuntary nonsuit as to defendant William Purcell. The plaintiff was not guilty of contributory negligence as a matter of law. That question was for the jury. *Grote v. Hussmann*, 223 S. W. 131; *Noack v. Williams*, 175 Mich. 15; *Barfoot v. White Star Line*, 170 Mich. 349; *Colorado Inv. Co. v. Reeves*, 21 Colo. 435; *Dawson v. Sloan*, 17 Jones & S. (N. Y. Sup. Ct.) 304, 100 N. Y. 620; *Wright v. Perry*, 188 Mass. 268; *Graney v. St. Louis*, 141 Mo. 184; *Stephens v. Eldorado Springs*, 185 Mo. App. 469; *Morris v. Rail-*

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road, 184 Mo. App. 113; Chase v. Railway, 134 Mo. App. 657; Atlanta Terminal Co. v. Johnson, 15 Ga. App. 22; Cadneau v. Railroad, 161 Mass. 355; Jolliffe v. Miller, 126 App. Div. 763, 111 N. Y. Supp. 406, 196 N. Y. 504; Wilcox v. Rochester, 190 N. Y. 1371; Shaninger Co. v. Mann, 219 Ill. 242; Loan & Trust Co. v. Jester, 180 Ind. 357; Conway v. Trust Co., 47 Mont. 269.

Thomas L. Anderson for defendant Purcell.

(1) Plaintiff was guilty of contributory negligence as a matter of law. Marshall v. United Rys. Co., 209 S. W. 931; Cluett v. Union Electric L. & P. Co., 205 S. W. 73; State ex rel. v. Ellison, 271 Mo. 463; Nolan v. Shickle, 69 Mo. 336; Powell v. Railway, 76 Mo. 83; 29 Cyc. 508; 2 Words and Phrases, 1545; Steger v. Immen, 122 N. W. 104, 24 L. R. A. (N. S.) 247; Ballou v. Collomore, 160 Mass. 246. (2) Where a person having a choice of two ways, one of which is perfectly safe and the other of which is subject to risk and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and cannot recover. Behre v. Hempe, 191 S. W. 1038; Bailey on Personal Injuries, secs. 1121, 1123; Shaw v. Goldman, 116 Mo. App. 332; Rogers v. Packing Co., 185 Mo. App. 109; 3 Labatt's Master and Servant, sec. 1249, p. 3432.

Buder & Buder, E. E. Schowengerdt and A. W. Wenger for defendant Gregg.

(1) No appeal lies from an order overruling motion for new trial as such. R. S. 1909, sec. 2038; Lowe v. Frede, 258 Mo. 208; Lowe v. Frede, 151 Mo. App. 569; Sperling v. Stubblefield, 83 Mo. App. 266. (2) No appeal lies from an order overruling motion to set aside involuntary nonsuit. R. S. 1909, sec. 2038; Boggess v. Cox, 48 Mo. 278; Lyons v. Rollinson, 109 Mo. App. 68; Conn v. Ferree, 60 Mo. 17; Sperling v. Stubblefield, 83 Mo. App. 266; Broyles v. Cooperage Co., 208 S. W. 122.

BROWN, C.—This is a suit against appellant Purcell as tenant and occupant, and his co-defendant Gregg as owner, of a building in the City of St. Louis, for personal injuries sustained by plaintiff in falling into an elevator shaft in said building. The petition charged that while the plaintiff was in the basement of the building for and engaged in the transaction of business with the tenant, he stepped into an open and unguarded elevator shaft and fell about twelve feet, receiving serious and permanent injuries. The petition contains five assignments of negligence, three of which were based upon common-law duties and two upon violation of certain ordinances of the city. The first three charge that the elevator shaft was negligently and carelessly left by defendants open, unguarded and without any guardrails or enclosure whatever around it, and that there were no lights in the basement to indicate the open and unguarded condition of the shaft, all of which conditions existed at the time Gregg leased the premises to Purcell. The fourth and fifth assignments were founded respectively upon two paragraphs of Section 2183 of the Revised Code of the City of St. Louis which are as follows:

“Paragraph 22. Lights.—A light shall be provided in all passenger and freight elevators.

“Paragraph 30. Every open hatchway in which a freight elevator is installed shall hereafter be securely protected on all sides to a height of at least six feet—said enclosure may be solid or constructed of two and one-half inch mesh wire of at least number eleven gauge, or of vertical or horizontal strips. If vertical strips are used, the open space between strips shall not exceed two and one-half inches. The entrance to the shaft shall be provided with a semiautomatic gate at least five feet in height, properly fitted with a device to prevent the gate from being opened until the platform of the car arrives at the floor landing, and which shall cause the gate to close automatically as the car leaves the floor landing.”

The petition charged that defendants had violated all the provisions of both city ordinances and that from

the time of leasing up to the time of the accident neither the light nor the enclosures or the gates required thereby had been installed in the said shaft, whereby and in consequence of all said negligent acts and omissions the plaintiff was injured as stated. Damages were laid and asked in the sum of \$10,000.

Each of the separate answers of the defendants consisted of a general denial and plea of contributory negligence.

After hearing the evidence the court, upon motion of each of the defendants, gave instructions to find for each of them, whereupon the plaintiff took a nonsuit with leave to move to set the same aside and in due time filed such motion, which was sustained as to the defendant Purcell and overruled as to Gregg.

Purcell takes this appeal from the order of the trial court sustaining, as against him, the motion to set aside the nonsuit, and granting a new trial.

Plaintiff appeals from the order overruling his similar motion as to Gregg.

It will be seen from the foregoing statement that the only question for our determination in Purcell's appeal is whether or not the evidence against him was sufficient to make a case for the jury.

Respondent Gregg has filed his motion to dismiss plaintiff's appeal on the ground that no final judgment was entered upon the nonsuit suffered by plaintiff as against Gregg, and that the order overruling the motion to set aside the nonsuit as against him is not a judgment or order from which an appeal lies.

These appeals have been consolidated in this court and tried as one case, and will be so treated in this opinion.

The appellant Purcell was a harness manufacturer in St. Louis, doing business in a building at the southeast corner of Main and Market Streets. The plaintiff was a credit man for the Armour Leather Company, who sold him leather for use in his industry. Some question arose as to his ability to pay for leather on hand

in his factory purchased from the Armour Company on credit. The matter came to the hands of Mr. Bonanomi, who arranged with Mr. Purcell that the leather might be removed from the factory at Main and Market streets to an Armour warehouse, to be held for him, and released from time to time as paid for. Mr. Bonanomi, on the day of the accident (April 23, 1918), went to the factory for that purpose. Mr. Purcell's office was on the first floor. The leather was in the basement, ten feet below, reached by an inside stairway, which reached the floor of the basement about ten feet from the shaft of the freight elevator which came from the floors above down into the basement. The stair landing was about midway between the elevator and the street door of the basement.

The elevator shaft in the basement was enclosed on three sides. On the side toward the room it had apparently been enclosed by double swinging doors, one of which was gone, leaving an open space of half the width of the shaft, say about two feet.

The leather was in the basement. After the arrangement for removing it had been made in the office, Mr. Purcell said, "I will take you down and show you where it is." He said "come this way" and the two men and Mr. Purcell's man Fred Ross got in the car and went down. There was no gate or automatic or other device to keep the shaft closed until the car should arrive at the floor landing. Either Mr. Purcell or his man operated the elevator. There was no light in it. When they arrived at the basement floor the two other gentlemen got out and the plaintiff followed them. The basement was very dark, there was no light in it. They left the elevator at the basement floor and level with it. The man opened the doors to admit light. Mr. Purcell showed plaintiff the Armour leather and its markings, and left plaintiff with Fred and a helper whom he told to assist in moving it as plaintiff checked it out. He left in a few minutes. Plaintiff went to the open door of the basement, where he could see the marks on the leather as it was brought to him. There were ten sides in each roll,

and the weight of the roll was marked on the outside. Mr. Purcell, after giving directions where the rolls might be put when brought out of the basement, went out through the basement door, up the sidewalk and around the corner of the building, a total distance of about fifty feet, to the main entrance of the office floor.

The plaintiff, having substantially described these surroundings, proceeded to describe the immediate incidents of the accident, as follows:

“MR. ANDERSON: A little louder; I can't hear you.

“THE WITNESS: I said when he had taken all the rolls of leather out of the basement and I had come back in the basement and asked him if we were through, if he had taken all the leather, he says, ‘Yes;’ I says, ‘Let's go upstairs,’ and I started over toward the elevator.

“MR. ANDERSON: Q. Who were you talking to?

A. Fred, his man. I says, ‘Let's go; if you are through we will go upstairs.’ So I started to go up the same way we came down and I started over towards what I thought was an elevator, and it looked to me just like the open door of the elevator, and I stepped in, and as I stepped in I fell down to the bottom of the shaft. There were no lights there.

“MR. GREEN: Q. Was there any guard or gate or anything there over that elevator shaft at that time? A. No, sir, not a thing.

“Q. Did you know the elevator was not there? A. No, sir; I did not.

“Q. Did you think it was there? A. I know it was not.

“Q. Did it appear as though it was there? A. It appeared as if it was there.

“Q. State to the jury how light it was down there at that time? A. Well, there was no lights down there; it wasn't light at all. The elevator being over away from the street, from any of the windows, if there were any windows there, it being dark you could hardly distinguish the shaft.

"Q. And how far into the shaft did you fall? A. Well, I have no means of ascertaining correctly, but I imagine between ten and twelve feet."

On cross-examination the plaintiff testified: "Q. So you could have walked that fifty feet and gone right into that doorway on the first floor of the building, couldn't you?" Here followed an objection and much argument.

The objection being overruled, the examination proceeded:

"Q. There was this perfectly good granitoid side walk; there wasn't anything the matter with the sidewalk, was there? A. Not that I know of.

"Q. You didn't see anything the matter with it at all? A. No.

"Q. Perfectly good solid granitoid sidewalk up to that doorway, wasn't there? A. As far as I know it was.

"Q. And you had been in that very doorway, the entrance to the building, the entrance to Mr. Purcell's office only an hour and a half or two hours before; that is true, isn't it? A. Yes, I had.

"Q. And you preferred and did go back into the basement, which you say was dark and unlighted; is that right? You still want to say that? A. I want to add this: That way back in the basement there was a gas jet, which the men lit in order to find the leather in the back part of the basement.

"Q. Way back in the back part of the basement. That was how far from where this elevator was? A. About twenty feet, I should say, as much as I can remember.

"Q. You wouldn't say it was one hundred and twenty? A. No; I can't say that.

"Q. Now, you say they lit a gas jet way back there; then they had some light back in the back part where it was dark, didn't they? A. In order to illuminate the basement; yes, sir.

"Q. They did have a light down there, then? A. At that time they did.

"Q. Gas light? A. But when they took the leather out and came back, that light was put out prior to my re-entry into the basement.

"Q. Then it had lapsed into total darkness; is that it? A. Well, you may call it such if you wish.

"Q. I don't wish to call it anything. All I want to find out is what you swear under oath was the condition there. A. I swore it was dark, and I still maintain it was dark.

"Q. That is the reason you say they had a light back there at one time. They turned the light out because there was no necessity for it; is that it? A. No; because they were through picking out the leather.

"Q. And they just turned the light out then because they didn't need any more light down there? A. Yes, sir.

"Q. Now, then, you left a good—perfect good sidewalk, out in the sunlight on the 23rd day of April, fifty feet from the doorway going into this gentleman's office, and this, with your full knowledge—you knew that, you say—to go back down into this basement, in the doorway leading into the basement and groped your way to where the elevator was. How far was the elevator from the door? A. Why, I would say, about twenty feet, I think.

"Q. About twenty feet. You had just come down out of there; you knew it didn't you? A. Well, I didn't measure the distance.

"Q. Did you grope around there to find the place where this elevator was in this total darkness? A. No, sir.

"Q. Or did you just walk right up to it; know where it was, and walk in there? A. You could see the shaft there. There was the dim outline of a shaft.

"Q. Then you knew that that elevator—where the elevator was; you could see this dim outline of the shaft? A. You could see the dim outline; yes, sir.

"Q. And you think it was about twenty feet from the door? A. I think so.

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"Q. Did you have to feel your way to this dim outline, or did you just walk into it like you were walking right in to sit down to a hot bowl of oyster soup? A. No, I walked cautiously.

"Q. Because it was so dark? A. Yes, sir.

"Q. And you could see the shaft; you saw the dim outline of it, and you knew it was an elevator shaft? A. Yes, sir.

"Q. And you were looking, were you, and using your eyes as you walked up to this shaft? A. I certainly was. . . .

"Q. Now, when you went to where the elevator was, didn't you say to Fred, 'Come on, let's go?' A. Words to that effect; yes, sir.

"Q. Well, what did you mean, go where? A. Go up in the office.

"Q. So you said to him, 'Come on, let's go up there?' A. Yes, sir.

"Q. He was there how far from you at that time? A. Well, he was right near me; two or three feet, I should say.

"Q. Within two or three feet? A. Yes, sir.

"Q. Well, he operated the elevator coming down, didn't he? A. Either he or Mr. Purcell."

I. The plaintiff's appeal was taken, not from a final judgment of the trial court upon involuntary nonsuit suffered by plaintiff because of the instruction of the court directing the jury to return a verdict for defendant Gregg. The order was limited in its terms to "an appeal to the Supreme Court of the State of Missouri from the order overruling his motion for a new trial and to set aside the involuntary nonsuit as to defendant C. D. Gregg." The right of appeal is purely statutory, and does not apply to such an order. [R. S. 1909, sec. 2038.] No final judgment having been entered in the cause it is still pending in the court below, awaiting the determination of Purcell's appeal from the judgment setting aside the involuntary nonsuit in his favor

taken by plaintiff. It is only necessary, therefore, at this time, to further consider the presence of Gregg in this court for the purpose of dismissing the plaintiff's appeal, which we accordingly do.

II. It is admitted for all the purposes of this appeal that no light was provided in this elevator, and that the hatchway through which it passed this basement floor was not guarded or surrounded by any fence or gate whatever at the usual point of entrance and exit when this accident occurred, nor was there any automatic or other device which closed the entrance and exit to and from the shaft when the car was not at this floor landing. A valid ordinance of the city required all these measures of precaution and their absence contributed to the injury, of plaintiff, which would not, in all probability, have happened had they been present. In short, the petition properly pleaded and the evidence tended to prove that the appealing defendant was guilty of negligence directly contributing to plaintiff's injury.

On the other hand the appellant Purcell contends that the plaintiff's own testimony shows that he was himself guilty of negligence directly contributing to his own injury, and that he cannot therefore recover from another damages which he helped to inflict upon himself. His contributory negligence as a matter of law is the real question before us.

Contributory negligence, like all other negligence, is usually a question for the jury, but there is a degree of care which the law exacts as a condition to the recovery of pecuniary damages. Recklessness of one's own safety may seem to be his own affair until he attempts to shift the burden of its consequences from his own shoulders to the shoulders of another. It then becomes the affair of both and, the facts being admitted, the law must adjust it between them.

In this case the plaintiff was upon the premises of the appellant by virtue of the invitation implied from

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commercial intercourse. By this invitation the owner assumed to use ordinary care for the safety of his commercial visitor. This degree of care is measured by the standard of the statutes as well as of the common law. If some of these precautions should be neglected it is still incumbent upon the visitor to give ordinary care and attention to his own safety as affected by the conditions which lie openly before him. This care is also measured by the law. These rules find a firm foundation in what we have been taught to call the golden rule.

Plaintiff was, according to his own statement, a business man of long experience, and we must assume that he was familiar with the ordinary appliances from the top to the bottom of structures in which the heavy goods produced and sold by his employers were marketed. In this case his story impresses us with a familiarity amounting to heedlessness.

He had transacted the business which was to result in the removal of the leather from the building, in the office on the first floor, which he reached by going into the main entrance at the corner of Main and Market streets. When he had finished, Mr. Purcell proposed to go to the basement and show him the leather. They stepped into the freight elevator, taking with them Mr. Fred Ross, the man who, with a helper, was to handle the leather. When they reached the landing in the basement, Ross and Purcell got out and he followed them. It was dark, and they opened the door to give more light, but it still remained dark at the elevator. Mr. Purcell showed them the leather. Plaintiff went outside the door on to the sidewalk where it was light to check the weight of the packages as they came out to be piled on the walk against the side of the building preparatory to hauling them to the Armour Warehouse. There were forty-two of the rolls, each one as big around as a barrel. They finished handling them in an hour or an hour and a half, and instead of walking fifty feet west on the granitoid sidewalk to the main entrance where he had first entered the office, he went back into the dark building where he

saw Ross and said to him, "Let's go up," and without waiting for Ross or for an answer, walked to the dark shaft where there was no elevator, and into it, and fell to the bottom. In his testimony he emphasized the darkness at the elevator. He saw the same opening, two feet wide, out of which he had come with Purcell when they descended, and without any invitation or appearance to indicate that the cage had remained there during the hour and a half he had been absent, walked into the hole and fell ten or twelve feet to the bottom.

The trouble which was the immediate cause of this accident seems to have been that one of the double swinging doors that closed the entrance to the elevator on this floor was broken. This was evident, and the plaintiff so stated. His carelessness in entering the dark shaft without any attempt to ascertain or reason to believe that the elevator was there, was evidently the cause of the accident. The absence of the light in the elevator had nothing to do with it, for the "elevator," in the sense in which the word is used in that provision of the ordinance, was not there.

We can fully appreciate the inexcusable carelessness of one who leaves unguarded an open hatchway like this, in the floor of a dark basement in constant use for the storage and handling of heavy goods by both employers and customers. In this case, to be sure, the space through which the victim must pass, or be thrust, to his fall, was only two feet wide. We need not charge our imagination with the task of suggesting possible injury from such a condition. The freaks of accident confound all foresight, and we guard against them by those conventional methods generally recognized as preventives, the most universal of which is to "look where we step."

On the other hand, what shall we say of the character of the carelessness of a man of intelligence and wide experience who walks up to such an aperture as we have just described, and, without any reason to believe that there is an elevator platform inside except that in the course of the constant business activities of such a place he had been

brought there on one an hour and a half before, steps off into the darkness which fills the bottom of the shaft which he knows is there. There is something in the circumstance which reminds us of the story of the absent-minded professor who stood, with hat in hand, bowing his apologies to the cow with whom he had collided on the sidewalk. Plaintiff knew that the right side of the door was off, and, if his mind acted at all, he staked his safety on the chance that the cage was in the same position as when he left it an hour and a half before. Had it been ever so dark a movement of his foot would have determined it.

The principle which bars a recovery for an injury arising from the negligence of both plaintiff and defendant was stated by the St. Louis Court of Appeals in *Wheeler v. Wall*, 157 Mo. App. 38, as follows:

"In an action for personal injuries, where it appears the injuries received might have been averted and the consequences of defendant's negligence avoided by the exercise of ordinary care on the part of the injured person, he is not entitled to recover, the case being one of mutual and concurring negligence, with respect to which the law will neither cast all of the consequences on the defendant nor attempt to apportion them between the parties; and when it appears that though defendant was negligent, the injury would not have occurred but for the negligence of plaintiff as well, contributing proximately thereto, will not be allowed."

In *Marshall v. United Rys. Company*, 184 S. W. 1. c. 165, REYNOLDS, P. J., of the St. Louis Court of Appeals in a dissenting opinion, said of one who was injured by jumping into an elevator shaft thinking the elevator was there: "Boy that he was, then about fifteen years old, he must have known that it was not safe to jump into a dark place without knowing the depth or where he was to land. Nevertheless he appears to have done that very thing, that is, rushed into an unknown, dark opening, without the slightest attempt to ascertain the conditions. In my judgment his carelessness, which produced his injury, was the proximate cause of that injury and should so have been declared

as a matter of law." The same cause was transferred to this court where, in an opinion by BOND, J., we stated the question as follows: "The theory of the appeal is that plaintiff was guilty of contributory negligence in jumping into the shaft without ascertaining the exact position of the elevator, and that the unguarded shaft was not the proximate cause of his injuries." [209 S. W. 1. c. 932.] We concluded as follows:

"After a careful examination of the record in this case, it seems to us that, upon the testimony of the plaintiff himself, the conclusion is inescapable that his own contributory negligence was the proximate cause of the injuries sustained by him when, without invitation or suggestion from any one, he yielded to the impulse to jump into the open shaft of the elevator. This is the view reached by REYNOLDS, P. J., in a separate opinion (184 S. W. 1. c. 164, 165), which we think announces the correct principles of law applicable on the undisputed facts in this case."

The case of *Grote v. Hussmann*, 223 S. W. 129, decided by the St. Louis Court of Appeals, draws plainly the line of distinction between those cases in which the injured party assumes for himself the risk of determining the position of the elevator and those in which the safety of the conditions in that respect is represented to him by the defendant. The case turned upon that single point. The court, referring to the plaintiff, said: "When he started to the elevator shaft, he saw defendant's employee standing in front of this elevator shaft, with the door open and his hand upon the door, a silent invitation to enter. This portion of the building was dark; the lights there were not burning. Defendant's witness, Heyer, so testified; and this same witness admits in his testimony that the door was open, and that he was standing in exactly the same position he would stand when he was ready to take passengers up on this elevator. This witness says that he had his back turned to defendant at the time he entered the shaft. If the jury believed this theory, they could still have found defendant guilty of negligence, for it cannot be said that defendant or his employee could

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open the door to an elevator shaft in which there is an elevator used for the purpose of carrying passengers, and stand there in an attitude indicating that passengers may enter if they so desire, and turn his back to this opening and permit plaintiff, under such conditions, and in a poorly lighted portion of the building, to walk into the shaft and be injured, and then claim that plaintiff was guilty of contributory negligence as a matter of law."

In this case the plaintiff took the initiative; in going from the door to the elevator he saw Fred Ross and remarked as he went on, "Come on, let's go", and, without giving anybody an opportunity to stop him, or any indication that he intended to go into the shaft whether the elevator was there or not, he entered without stopping or looking, and of course fell to the bottom. The difference in the two cases is that in the Grote case the defendant assumed or negligently appeared to assume to be in control of the elevator, and to invite the plaintiff to enter by acts usually implying such invitation. In this case the plaintiff, according to his own statement, took charge of the situation and gave no one any opportunity to interfere. In going down, which was his only previous trip in that elevator, it was operated, he says, by Purcell or Ross. He does not recall which. They invited him in, and when they reached the basement landing they stopped the elevator at the right place and invited him out. In his attempt to go up he himself was captain of the enterprise until he stepped off into the dark, and the enterprise, so far as its legal aspects are concerned, was fully accomplished.

We think his own act was the direct and proximate cause of his injury. The acts with which defendant is charged went no further than to give him the opportunity.

What we have said applies equally to both these appeals. In case of the appeal of defendant Purcell from the order of the court setting aside the nonsuit against him, said order is reversed. The appeal of plaintiff from the order refusing to set aside the nonsuit as to Gregg is dismissed.

The cause is remanded to the Circuit Court of the City of St. Louis for such further proceedings upon the judg-

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ment of nonsuit as entered in that court, as may be in accordance to law and the practice of the court. *Ragland* and *Small*, CC., concur.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All of the judges concur.

CUDAHY PACKING COMPANY v. CHICAGO &
NORTHWESTERN RAILWAY COMPANY, Ap-
pellant.

Division One, April 9, 1921.

APPEAL FROM JUSTICE: Waiver of Defects in Process. Under Revised Statutes 1909, Sections 7568 and 7579, the taking of an appeal from a justice of the peace invests the circuit court with power to hear and determine the case anew; and the appeal operates as a voluntary entry of appearance by the appellant in the circuit court, and if there is any defect in the summons or in the service thereof it is thereby waived. [Overruling *Meyer v. Ins. Co.*, 184 Mo. 1. c 488, and subsequent cases.]

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas*, Judge.

AFFIRMED.

George Kingsley for appellant.

(1) The court acquired no jurisdiction over the defendant, and had no authority to enter judgment against it, because no copy of plaintiff's petition was served with the writ of summons. R. S. 1909, sec. 1760; 32 Cyc. 449; *Feurt v. Caster*, 174 Mo. 289. (2) Defendant being a foreign corporation, as the return to the writ of summons shows, should have been served according to Section 1760, R. S. 1909. Service was not good even under Section 1766, because it does not ap-

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pear that the president or other chief officer of the defendant was absent from the county. *Horn v. Railroad*, 64 Mo. 561. (3) Defendant by taking an appeal to the circuit court did not waive the defects of jurisdiction. *Meyer v. Ins. Co.*, 184 Mo. 481; *Bente v. Typewriter Co.*, 116 Mo. App. 77; *State ex rel. Fairbanks v. Ayers*, 116 Mo. App. 90.

New, Miller, Camack & Winger, P. E. Reeder and John Taylor for respondent.

The alleged defects in the summons and return were cured by defendant's appeal from the judgment of the justice. Secs. 7568, 7579, R. S. 1909; *Ser v. Bohst*, 8 Mo. 560; *Damhorst v. Railway Co.*, 32 Mo. App. 350; *Gant v. Railway Co.*, 79 Mo. 502; *Fitterling v. Railway Co.*, 79 Mo. 504; *Boulware v. Railroad*, 79 Mo. 494; *Hull v. Beard*, 80 Mo. App. 200; *Musgrove v. Mott*, 90 Mo. 107; *Lesan Adv. Co. v. Castleman*, 265 Mo. 345; *Powell v. Railroad*, 178 S. W. 216; *Whiting v. Railroad*, 101 Mo. 631; *Idalia Realty & Dev. Co. v. Norman*, 184 Mo. App. 146.

JAMES T. BLAIR, J.—In this case the Kansas City Court of Appeals rendered a decision (*Cudahy Packing Co. v. C. & N. W. Ry. Co.*, 207 S. W. 70) which it deemed contrary to a previous decision (*Swezea v. Jenkins*, 186 Mo. App. 428) of the Springfield Court of Appeals. This explains the presence of the case here. [Sec. 6, Amd. of 1884 to Art. VI. of the Constitution of Missouri.]

Plaintiff Packing Company sued in a justice's court to recover from defendant Railway \$156.75 damages for losses it alleges it suffered by reason of defendant's failure to re-ice a car of meat. Summons issued and an attempt at service was made. A motion to quash the return was overruled by the justice. Defendant made no further appearance in the justice's court, and judgment went for plaintiff. In due time defendant filed its affidavit and bond for appeal. The appeal was duly granted

by the justice and the case properly lodged in the circuit court. In that court defendant filed its motion to "quash, set aside and vacate" the writ of summons and the return thereon. This motion was overruled. Defendant made no further appearance, and judgment again went for plaintiff. From this judgment defendant appealed to the Kansas City Court of Appeals, which affirmed it and transferred the cause to this court for the reason stated.

Several questions are discussed in the briefs, but the Court of Appeals disposed of the case by a ruling that the taking of an appeal from a justice's court "waives the question of defective summons" in that court "and amounts to a general appearance in the circuit court." This ruling, if correct, disposes of the case. The question would not seem to require much space for its discussion were it not for the fact, pointed out by the Court of Appeals, that there is considerable conflict in this State in the decisions upon the subject. In view of this it is necessary to examine several previous decisions.

The effect of an appeal from a justice's court upon defects in or want of summons or service in that court depends upon the governing statute. That the Legislature constitutionally may enact that such an appeal, taken to a court where a trial *de novo* is to be had, shall constitute a general appearance in the cause, cannot be seriously questioned. Decisions subsequently referred to disclose that no constitutional obstacle is thought to intervene. The question in this case, therefore, concerns solely the meaning of the applicable statute as written.

In 1835 (Sec. 8, p. 370, R. S. 1835) it was enacted that upon the filing of the transcript "in the clerk's office, the court shall be possessed of the cause, and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the proceedings of the justice." In the first case we have found in which this court referred to this section, it is clearly indicated that the court thought the taking of

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an appeal from the justice constituted an appearance having some efficacy to waive the insufficiency of the return of the summons in the justice's court. [Atwood v. Reyburn, 5 Mo. 533.] In Lutes and Dulany v. Perkins, 6 Mo. 57, there had been no service upon Lutes, one of the defendants, in the justice's court. Lutes and Dulany both appealed from the judgment of the justice. In the circuit court both moved to set aside the judgment of the justice for the reason that the justice had no jurisdiction of the cause of action and none of the persons of movents. The court said that the return on the justice's process showed no service on Lutes and that "the circuit court committed error in entering up judgment against Lutes." Section 8, p. 370, Revised Statutes 1835, was neither cited in the briefs nor mentioned in the opinion. In Ser v. Bobst, 8 Mo. 506, the service of the summons had been insufficient to give the justice jurisdiction of the person. The case was under the forcible entry and detainer act. The justice entered judgment by default. Defendant appealed. The controlling statute (Sec. 36, p. 49, Laws 1838-39; Act of January 28, 1839) was, in so far as concerns the question here, like Section 8, page 370, Revised Statutes 1835. The circuit court dismissed the appeal. This court held that the circuit court should, "without regarding any error, defect, informality, or imperfection, in the proceedings of the justice, have proceeded to hear, try and determine the same anew, as if it had originated in that court . . . The appellant, by bringing up the cause, had dispensed with the necessity of a regular summons before the justice." In Williams v. Bower, 26 Mo. 601, the summons issued by the justice had been made returnable in nine days instead of the minimum fifteen days prescribed by the statute. There was judgment by default and an appeal to the Law Commissioners Court (R. S. 1855, p. 1596, et seq.) where a motion to dismiss for the mentioned defect was overruled and the cause was then brought to this court. The question of the effect of the appeal upon defects of service was not men-

tioned; but the court did reverse the judgment and dismiss the cause because, it held, the summons was void. *Sanders v. Rains*, 10 Mo. 770, was cited. In that case no appeal had been taken from the justice's court, and the question of the effect of an appeal was neither presented by the record nor referred to by the court. In *Hunt v. Cobb*, 28 Mo. 198, the rule in *Williams v. Bower*, was applied. The question before us was not referred to by the court. Judge Scott dissented on another ground. In *Blunt v. Railroad*, 55 Mo. 157, defendant moved in the justice's court to set aside judgment by default, on the ground that "the process was not legally issued and served." The motion was overruled and defendant appealed to the circuit court. There it moved to dismiss the cause for the same reason but did not except to the adverse ruling of the circuit court. On error this court said that under the statute (like that of 1835) "the effect of an appeal to the circuit court, without anything further, amounts to full appearance to the action of the circuit court." This would seem to dispose of the matter, but the court added: "But the appellant is allowed by motion in the appellate court to demonstrate the purpose of his appeal, which was done in this case. This motion, however, was overruled." If the defect of service was waived by appeal, it would seem the permission to demonstrate such a "purpose of his appeal" would contain small comfort for the defendant. The court further said it could not consider the overruling of the motion because no exception had been saved. Unless the appeal waived the defect in the process it would seem the question could have been reached on the record. This decision has the appearance of deciding the question both ways. In *Jordan v. Railway*, 61 Mo. 52, defendant objected to the justice's process by motion to set aside judgment by default. The motion was overruled and defendant appealed to the circuit court. That court overruled a motion to dismiss the cause because of defects in the justice's process. On appeal this court reversed the judgment and remanded the cause with di-

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rection that the case be dismissed unless facts were shown which justified an amendment showing service. The question of the effect of the appeal as an appearance was not suggested or considered. This decision was rendered at the October Term, 1875.

Thereupon the Legislature came to the rescue. In 1879 (Sec. 3052, R. S. 1879) the old statute (Sec. 13, p. 724, G. S. 1865), which had remained the same since 1835 and under which the varying decisions referred to had been rendered, was amended to read as follows:

"Upon the return of the justice being filed in the clerk's office, the court shall be possessed of the cause, and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the *original summons or the service thereof, or on the trial, judgment, or other proceedings of the justice or constable in relation to the cause.*"

The italics indicate the words added by the amendment. This change in the law seems designed to reach the question left in doubt by the decisions. The Circuit Court of Linn County thought so in *Brandenburger v. Easley*, 78 Mo. 659, but the decision of this court was, in effect, to the contrary. In *Boulware v. Railroad*, 79 Mo. 494, the record presented the question, and Section 3052 and *Ser v. Bobst*, *supra*, were cited. The court nevertheless seems to have put the decision on the ground that defendant appeared generally in the justice's court. In *Gant v. Railway*, 79 Mo. 502, the court held both (1) that an appearance to move to set aside default constituted an appearance in the justice's court, and (2) that the taking of the appeal from the justice, under Section 3052, "dispensed with the necessity of a regular summons before the justice."

In 1875 the St. Louis Court of Appeals had been established. In 1882 in *Gibbs v. Railway*, 11 Mo. App. 459, it was held that under Section 3052, Revised Statutes 1879, an appeal from a justice constituted a waiver of all defects of service. The same holding appears in *Heine v. Morrison*, 13 Mo. App. 590, and *Martin v. Prietto*, 14

Mo. App. 596. In *Smith v. Simpson*, 80 Mo. l. c. 636, and *Fare v. Gunter*, 82 Mo. 522, it seems that this court again thought that a defendant might, under Section 3052, appeal from a justice's court and be entitled to object in the circuit court for the insufficiency or want of service. The case of *Fare v. Gunter* was decided at the October Term, 1884. In the Laws of 1885, p. 186, under date of March 31, 1885, appears a further effort to solve the problem. It was attempted to add a proviso to Section 3041, Revised Statutes 1879, expressly providing that "the affidavit and bond for appeal filed shall be taken and considered by the appellate court as an entrance of appearance." Whether this proviso fell outside the breastworks because of the title and the character of the introductory part of Section 2 of the Act, it is unnecessary to decide since it is certain it was validly incorporated in the section by the revised bill on Justices Courts which was passed in 1889. In 1887 the St. Louis Court of Appeals held in *Eubank v. Pope, Lockwood & Co.*, 27 Mo. App. l. c. 464, that the taking of an appeal from a justice's court "waives all defects or omissions touching the original service, and brings the appealing party into court for all the purposes of the cause." In *Witting v. Railroad*, 28 Mo. App. l. c. 107, *Rice v. Railway*, 30 Mo. App. l. c. 112, and *Fitzpatrick v. Railway*, 34 Mo. App. l. c. 285, like holdings appear. The *Witting* case reached this court by transfer, and it was held, *Witting v. Railroad*, 101 Mo. l. c. 635, that the appeal from the justice waived "all errors and defects in the original summons and in the service thereof." In *Carter v. Wamack & Staggs*, 64 Mo. App. l. c. 341, 342, the same rule was applied. In 1901 (*Meyer v. Ins. Co.*, 92 Mo. App. l. c. 398) it was held that an appeal was equivalent to a general appearance in the circuit court. The cause was transferred to this court because of conflict on the point. While it was pending here the *Witting* case was followed in *Winer v. Maness*, 94 Mo. App. l. c. 164 and 165.

In due time the Meyer case came on for hearing in this court. [Meyer v. Ins. Co., 184 Mo. 481, l. c. 487.] This court held that the defendant in that case was properly brought into court by valid summons properly served and that, therefore, the "appeal by the defendant from the justice of the peace cuts no figure in the case." The court then proceeded to point out, citing cases, that under our practice a "defendant can unite in the same pleading a plea to the jurisdiction, as to the person as well as to the subject-matter, with a plea to the merits, and that he does not thereby waive the question of jurisdiction of the court." Further, it was held that "defendant did make timely objection" to the jurisdiction of the person "both in the justice's court and the circuit court, and the fact that when the justice ruled against him he took an appeal to the circuit court no more waived that objection than if it or any defendant had appeared to the action and pleaded to the jurisdiction and to the merits in the same answer." It was also said that the St. Louis Court of Appeals erred in holding that by taking an appeal from the justice, "after the justice had ruled against it on its plea to the jurisdiction" of the person, "the defendant waived the plea to the jurisdiction." The court said that, on the contrary, "the defendant never waived the plea but has always properly made and preserved the question;" that the "St. Louis Court of Appeals overlooked the rule in this State that a defendant can appear and plead in abatement and in bar at the same time and in the same plea." After that decision was promulgated the courts of appeals usually construed it as an abandonment of the decision in Witting v. Railroad, supra, and like cases, and followed it as so construed until this court, in the same division, Number One, decided in Lesan Advertising Co. v. Castleman, 265 Mo. l. c. 351, that "the jurisdiction of the person of appellant was complete by his appearance in the justice's court at the trial; by taking the appeal, and thereby going voluntarily into the circuit court (Boulware v. Railroad, 79 Mo. 494; R. S. 1909, sec. 7568) and by his gen-

eral appearance in the circuit court." In that case defendant's motion in the circuit court contained grounds other than those going to the jurisdiction. Thereafter (Powell v. Railway, 178 S. W. 212) the Lesan case has been followed as overruling the Meyer case. The Powell case was transferred to this court but dismissed before it was reached.

The practically universal rule in other jurisdictions is that an appeal from the judgment of a justice of the peace to a court where a trial *de novo* must be had waives all defects of jurisdiction over the person of the appellant and amounts to a general appearance in the appellate court. [2 R. C. L. sec. 96; 24 Cyc. pp. 694, 695.] In notes to Gulf Pipe Line Co. v. Vanderberg, 28 Okla. 637, 115 Pac. 782, which appear in 34 L. R. A. (N. S.) p. 661, et seq., and in 1912D Ann. Cases, p. 411, et seq., the cases are collected. They come from the courts of more than a score of states and constitute an impressive array, whether considered from the point of view of numbers, the number of states from which they emanate, the character of the tribunals which decided them, the unanimity of opinion which they disclose or the soundness of the underlying reason upon which they are based. Later cases adhere to the same rule. [German Investment Co. v. Westbrook, 101 Ark. 124; Stephens v. Wheeler, 60 Colo. 1 c. 356; Doggett v. Railway, 31 Okla. 177; Cohn v. Clark, 48 Okla. 500; Gibson v. Haworth, 47 Pa. Super. Ct. 1 c. 622; Smith v. Thompson, 85 W. Va. 364, 101 S. E. 723.]

The purpose of an appeal from a justice of the peace in this State is to secure a "trial anew." That is the sole purpose for which such appeal is permitted by the statute. [Sec. 2902, R. S. 1919.] When a defendant appeals he therefore appeals for that purpose and no other. The very lodging of the appeal in the circuit court constitutes an invocation of the appellate jurisdiction of that court; and, since the circuit court, on such an appeal, has no appellate jurisdiction except for the purpose of a trial anew, it is an invocation of that

court to exercise its jurisdiction in a trial anew. This of itself constitutes such an appearance as to waive defects in or absence of summons or service. In this State this principle is supplemented, as already pointed out, by one statutory provision (Sec. 2902, R. S. 1919) which expressly directs the circuit court on appeal to disregard every "error, defect or other imperfection in the original summons or service thereof," and another which expressly provides (Sec. 2891, R. S. 1919) that "the affidavit and bond for appeal filed shall be taken and considered by the appellate court as an entry of appearance." No defendant is obliged to appeal. If not served properly he may elect whether he will or will not appeal. If he does so, he must abide the consequences. He has appeared. If he does not appeal and the service proves good, his "judgment" was bad and the justice's judgment will stand. If it is not good, then he is in no worse position than any other suitor against whom it is attempted to render a judgment without service of process. Of course, what we have said refers only to defects in jurisdiction over the person.

The case of *Meyer v. Ins. Co.*, 184 Mo. 481, disposed of the question without discussing the cases, in or out of the State, or the statutes which relate to it. The decision was, in the main, put upon the ground that under our practice a defendant may unite in the same pleading a plea in abatement with a plea to the merits. We are unable to perceive the relevance of this principle to the question then and now being decided. The earliest of the cases cited in the *Meyer* case on the point is *Little v. Harrington*, 71 Mo. 390, in which it was held that the then existing sections of the statutes (Secs. 3513 and 3522, R. S. 1879), which are still in force (Secs. 1224 and 1233, R. S. 1919), dispense with the common-law rule that matter in abatement might not be joined with matter in bar without waiving the former, and permitted all defenses, whether in abatement or in bar, to be pleaded in the same answer. The other decisions also plant the rule upon the same sections of the statute.

Section 1224, Revised Statutes 1919, provides: "The only pleading on the part of the defendant is either a demurrer or an answer." That portion of Section 1233, Revised Statutes 1919, relied on in the case cited, reads: "The defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both." What the court holds in the cases mentioned is that these statutory provisions mean what they say, i. e. that there can be but one answer and it must contain all the defenses the defendant may *have*. The fact that a defense may be pleaded in a certain way, if the defendant *has* such a defense, does not bear upon the question whether under given conditions, the defendant *has* that defense. The question upon which the Meyer case was certified here was not whether the supposed defect in the service could be pleaded with matter in bar. It was whether there had been a waiver of a supposed defect in the service. There was no contention in the Meyer case that defendant had waived its objection to the jurisdiction of the person by the filing of the motion in the justice's court or of that in the circuit court, directed against such jurisdiction. No matter in bar was included in either motion. [State ex rel. v. Grimm, 239 Mo. l. c. 171, et. seq.; State ex rel. Bulger v. Southern, 278 Mo. l. c. 621.] The insistence was that the taking of the appeal from the justice constituted a general appearance. It may be conceded that defensive matter in abatement may be pleaded in the same answer with matter in bar without being waived thereby. It may also be conceded that "in an ordinary action an appearance solely to challenge jurisdiction for want of service gives no jurisdiction of the person." [State ex rel. Bulger v. Southern, *supra*.] Let it also be conceded that after such a special appearance, in a proper case, movent ordinarily may proceed with the case without thereby waiving the point of jurisdiction. Nevertheless, the question whether the appeal from the justice constituted a general appearance which gave full jurisdiction of the

person of the defendant was not settled by either of these considerations. If the service was bad, it did not bring defendant into the justice's court; but the appeal constituted a *general* appearance for all purposes, despite the motion to dismiss filed before the justice. That is the effect of a general appearance. We do not think the court meant in the Meyer case to hold that after objection once made, a defendant can enter his general appearance and still insist upon the objection. Let it be again conceded that he may do such things as would, absent the previous objection, have amounted to a general appearance, without waiving the objection. The result of this is not to destroy the effect of a *general* appearance as a waiver of objections to the person, but, upon condition that objection to the jurisdiction is first made, to permit certain things to be done after such special appearance, without the doing of them being held to constitute a general appearance. In the Meyer case, as in this, defendant objected in the justice's court to the sufficiency of the service. That objection did not give jurisdiction of the person. Defendant then appealed. Such an appeal is expressly and unconditionally declared by our Legislature to be a general appearance. No exception is made of cases in which a plea to the jurisdiction previously shall have been filed. All are included. The appeal brought defendant into court. His motion in the circuit court was futile. He had already appeared generally. No question of pleading was involved. It is clear that the right to file a plea to the jurisdiction of the person does not include a right thereby to undo the effects of a previous general appearance.

We think the decision in the case of Meyer v. Ins. Co., 184 Mo. l. c. 488, 489, in so far as the point now in judgment is concerned, is erroneous and should no longer be followed. The same conclusion applies to a like ruling in Swezea v. Jenkins, 186 Mo. App. 428; Trimble v. Elkins, 88 Mo. App. 229; State ex rel. Fairbanks v. Ayers, 116 Mo. App. 90; Bente v. Typewriter Co., 116 Mo. App. 77; Mfg. Co. v. Railroad, 167 Mo. App. 683,

and those other decisions already mentioned, and others if there be any, from this and the courts of appeals which hold contrary to the view taken in this case. It is due to our brethren of the several courts of appeals to say that they struggled valiantly against the errors of this court and rendered correct decisions in interims in which decisions of this court permitted the correct rule to be followed; and that several of the cases we overrule have already been overruled by the courts which promulgated them but in decisions not officially published, and we include them here for that reason. The judgment is affirmed. All concur.

SECURITY NATIONAL BANK OF OKLAHOMA
CITY, Appellant, v. PEOPLE'S BANK OF SUL-
LIVAN, MISSOURI.

Division One, April 9, 1921.

1. **NEGOTIABLE SECURITIES: Powers of Congress: Delegation of Power.** The Congress of the United States, having power under the Constitution to issue negotiable securities for governmental purposes, has the further power of delegating to the Secretary of the Treasury the determination of the question whether or not such securities should be negotiable, as in the case of the *interim* certificates issued during the World War for bonds not yet ready for delivery.
2. ———: **Liberty Loans: Interim Certificates.** The Act of Congress of April 24, 1917, providing for the issue of Liberty Bonds, gave the Secretary of the Treasury power to issue *interim* certificates to be held until the bonds could be prepared, and also to make them negotiable.
3. ———: **Form and Terms: According to Common Law and State Statutes.** The power of the United States to make its securities negotiable is not subject to any rules of common law or state statute in respect to form or terms.
4. ———: **Negotiable in Form.** Every *interim* certificate issued under the Liberty Loan Act of Congress of 1917 provided that "upon surrender of this *interim* certificate, the bearer hereof will be entitled to receive, when prepared, definitive bonds in the amount of —dollars, bearing interest from June 15, 1917. This certificate

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and all rights under and by virtue hereof shall pass by delivery. There must be no writing on this certificate until it is presented for exchange for bonds." *Held*, that these certificates were clearly intended to be and are negotiable instruments.

5. ———: **Theft of Interim Certificates: Bona-Fide Purchasers.** Certain negotiable *interim* certificates of the United States were stolen from a bank in Missouri, and were shortly afterward acquired by a bank in Oklahoma in the ordinary course of business from two of its customers who resided and did business in its home town, without notice of or reason to suspect any defect in their title, and for their full face value. The Oklahoma bank was at the same time buying from other persons on the same terms. *Held*, that it was a bona-fide purchaser for value, and had the title as against the Missouri bank.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

REVERSED (*with directions*).

Fordyce, Holliday & White for appellant.

(1) Securities issued under acts of Congress exercising its power to borrow money on the credit of the United States, must be construed with regard to such act, and are not governed either as to their character or effect by local law. U. S. Constitution, Art. 1, sec. 8; *United States v. Stephenson*, 27 Fed. Cas. 16386; 1 McLean, 462; *Legal Tender Case*, 110 U. S. 421. (2) Even under local law the *interim* certificates are negotiable, because the holder has the option, either to exchange them for definitive bonds or to hold the same until maturity and demand payment in money. *Hodges v. Schuler*, 22 N. Y. 114; *Hotchkiss v. National Bank*, 21 Wall. 354; *Jones on Corporate Bonds*, sec. 190, p. 213. (3) *Interim* certificates, or scrip, when they provide for exchange for negotiable bonds, are themselves negotiable under the Law Merchant. *Jones on Corporate Bonds*, sec. 184, pp. 207-208; *Goodwin v. Roberts*, 1 App. Cases, 476; *Rumball v. Metropolitan Bank*, L. R. (Q. B. D.) 194.

James Booth for respondent.

(1) The *interim* certificates were issued and delivered in Missouri by one resident of the State to another resident of the State; and the bonds therein called for were to have been delivered in Missouri. The contract is to be construed by Missouri law. *National Bank v. Cudahy*, 126 Fed. 543; *Trower Bros. v. Hamilton*, 179 Mo. 205; 39 Cyc. 898; *Davis v. McCall*, 179 Mo. App. 198; *Smoot v. Judd*, 161 Mo. 673; 8 C. J. sec. 153, p. 92. (2) Under the Missouri law an instrument to be negotiable must comply with the following requisites: First, it must be in writing, and signed by the maker or drawer; second, it must contain an unconditional promise to pay a sum certain in money; third, it must be payable on demand or at a fixed or determinable time, and it must be payable to order or bearer. Sec. 788, R. S. 1919; Sec. 997 $\frac{1}{2}$, R. S. 1909. (3) And because the certificates in question were not payable in money and because they did not contain a promise to pay at all, they were not negotiable, either at common law or under the Missouri statute. 8 C. J. sec. 225, p. 130; *Mathews v. Haughton*, 11 Me. 337; *Lawrence v. Dougherty*, 5 Yerg. 435; *Jones v. State*, 40 Ark. 345; *First Natl. Bank v. Greenville Natl. Bank*, 19 S. W. 334; *Easton v. Hyde*, 13 Minn. 90; *Frt. & Cotton Press Co. v. Standard*, 44 Mo. 71; *Chandler v. Calvert*, 87 Mo. App. 368; *Kessler v. Clayes*, 147 Mo. App. 88; *Farwell v. Kennett*, 7 Mo. 595; *Missouri v. Benoist*, 10 Mo. 523. (4) The *interim* certificates not being negotiable the purchaser is not protected either by the Law Merchants or the local statutes of Missouri. 8 Cyc. 57; 8 C. J. sec. 1052, p. 797. (5) Under the supreme law of the land all legislative powers are vested in Congress; and the Secretary of the Treasury has never been delegated the power to legislate and make those instruments negotiable which, according to the due course of the common law and local statutes, were not negotiable. U. S. Constitution, art. 1; *Morrill v. Jones*, 106 U. S. 466; 17 C. J. sec. 39, p. 477.

SMALL, C.—This suit was in equity against the Federal Reserve Bank of St. Louis, and the People's Bank

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of Sullivan, Missouri, to enjoin the Federal bank from delivering to the Sullivan bank certain Liberty bonds called for by twenty *interim* certificates for such bonds which plaintiff claimed to own as an innocent purchaser for value. Eight of said certificates were for \$50 each, eleven for \$100 each, and one for \$500. Each certificate called for a Liberty bond for the amount of such certificate. All the certificates were in the same form and alike, except as to amounts, and were all executed by the Federal Reserve Bank of St. Louis on September 1, 1917. Said form was as follows:

“The United States of America 15-30 Year Gold Bonds

“3½% Liberty Loan Full-Paid *Interim* Certificates.

“Fifty Dollars (\$50.00) 100 % paid.

“This is to certify that in accordance with the terms of Treasury Department Circular No. 78, dated May 14, 1917, payment in full has been made for fifty dollars face amount United States 15-30 year 3 ½ per cent gold bonds of the Liberty Loan authorized by Act of Congress approved April 24, 1917. Upon surrender of this Interim Certificate to the undersigned bank, the bearer hereof will be entitled to receive, when prepared, definitive bonds in the face amount of fifty dollars bearing interest from June 15, 1917. This certificate and all rights under and by virtue hereof shall pass by delivery hereof. This certificate shall not be valid unless executed in the name of a Federal Reserve Bank (as Fiscal Agent of the United States) by the cashier or an assistant cashier of such bank.

“W. G. McAdoo,

“Secretary of the Treasury.

“Dates:.....

“Federal Reserve Bank of
St. Louis,

“Fiscal Agents of the United
States

“By.....

“Assistant Cashier.

“1760776

"There must be no writing in this certificate until it is presented for exchange for bonds.

"Upon presentation hereof for exchanges for bonds, when prepared, the following must be filled out and signed by the owner of this certificate:

"The undersigned owner of the within *Interim Certificate* desires:

"One Bonds of the Denomination of \$.....

"In bearer Form with Coupons Attached.

"Bonds of the Denomination of \$.....

"Registered as to Principal and Interest.

"(Strike out the description of the form of bond not described.)

"Directions for Delivery of bonds.

"Name:

"Address:

"If Registered Bonds are desired, state in whose name they are to be registered and the address of the registered owner:

"Name:.....

"Address:.....

"Signature of Owner:.....

"Date:.....

"In the absence of written request on the foregoing blank for bonds of specific denominations and form, there will be delivered in exchange for this certificate, coupon bonds of the largest denomination or denominations in which coupon bonds are issued and contained in the amount of bonds called for by this certificate.

"Bearer bonds with interest coupons attached, will be issued in denominations of \$50, \$100, \$500 and \$1,000. Bonds registered as to principal and interest will be issued in denominations of \$100, \$500, \$1,000, \$5,000, \$10,000, \$50,000 and \$100,000. Provision will be for the interchange of bonds of different denominations and of coupon and registered bonds—upon payment, if the Secretary of the Treasury shall require, of a charge not exceeding \$1 for each new bond issued upon such exchange. Transfer of registered bonds and exchanges of regis-

tered and coupon bonds and of bonds of different denominations will not be made until October 1, 1917, or such later date as may be designated by the Secretary of the Treasury.

“There Must Be No Writing on This Certificate Until It Is Presented for Exchange for Bonds.”

The petition further stated, that said certificates were negotiable, that the Liberty bonds called for by said certificates had been prepared and were held by defendant, Federal Reserve Bank ready to be exchanged for such certificates, which plaintiff had deposited with said Reserve bank. But it refused to deliver said Liberty bonds to the plaintiff, because it claimed said certificates had been stolen from the defendant, Sullivan bank, which claimed some right therein, and in the bonds called for thereby.

The said bonds, being deposited in court by the Federal Reserve Bank, the suit was dismissed as to it, and tried as between plaintiff and defendant, Sullivan bank.

The answer of the Sullivan bank admitted, the issue of the *interim* certificates, the holding of the Liberty bonds called for therein by the defendant, Federal bank, the surrender of such certificates by the plaintiff to the Federal bank, and its refusal to deliver the bonds thereon to the plaintiff. Denied that plaintiff purchased the certificates in good faith or paid value therefor.

By way of cross-bill and interpleader, the Sullivan bank, alleged that it was the owner of said certificates, having purchased the same from the said Federal Reserve Bank. That it placed said certificates in its safe at Sullivan, Missouri, from which they were stolen by unknown persons, who broke open the safe and carried away said certificates. That said certificates are and were not negotiable. That said defendants is still the owner thereof. That plaintiff knew at the time it purchased said certificates, that the persons from whom it obtained them had no title thereto. Wherefore, said Sul-

livan bank asked the court to declare that it was the owner of said certificates and bonds deposited in court, and for general relief.

Plaintiff's reply put the new matter in the answer and cross-bill in issue.

There was an agreed statement of facts, which admitted the form and issue of the certificates as set out by the plaintiff in its petition, and the facts admitted by the pleadings. That said certificates were originally purchased from said Federal bank by the Sullivan bank, and afterwards stolen from it, as alleged in its answer and cross-bill. Touching the acquisition thereof by the plaintiff, the agreed statement recites:

"During October and November, 1917, the Security National Bank of Oklahoma City purchased all of the certificates above mentioned under the situation set out in the deposition of J. C. Eagen and G. L. Kellog heretofore filed in this case. It is stipulated and agreed that said depositions shall be considered a part of this Agreed Statement of Facts, and that such evidence is all the evidence touching the manner in which the Security National Bank of Oklahoma City acquired said *interim* certificates."

J. C. Eagen, testified, for plaintiff, in his deposition, substantially, as follows: That in October and November, 1917, he was an employee of the plaintiff bank. Remembered some of the certificates were purchased from the Kelley Jewelry Company, and an individual named John Garrett, in Oklahoma City, where plaintiff bank was located; each were customers of the bank, and carried deposits with it. He advised the receiving teller to give said jewelry company credit for the face amount of one or more of these certificates. "Q. Did the Security National Bank give credit for the face of each of the certificates you have referred to? A. I have looked it up on the books of the bank, and find that credit was given or cash paid for the full face value of all the certificates."

Continuing, the witness said: "I am under the impression I advised the receiving teller to give the Kelley

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Jewelry Company credit for the certificates. I also advised him to cash other certificates, which he had at the same time. The bank received other certificates, besides those in this litigation at that time. It received these certificates in the ordinary course of business. I know of no defect in the title to any of the certificates, and had notice of none. The Kelley Jewelry Company checked out its credit involved in this transaction. I knew of no fact that would lead me to believe that the title to these certificates was defective. The plaintiff bank gave credit or cash for full face amount of the certificates in each case."

On cross-examination, witness said: Could not recall any conversation with either said Jewelry Company or Garrett, prior to purchase of certificates. Could not recall the particular certificates bought from either, nor which witness handled personally. The particular instances he had in mind were two one-hundred dollar certificates, and some others, fifties and hundreds, could not give their numbers, nor how many were bought from Garrett, nor how many from the Jewelry Company. Had no talk with either of said parties. The Kelley Company informed him, that they had given merchandise for some of the certificates—referred to H. M. Kelley. Witness personally purchased none from Garrett. Garrett still lives in Oklahoma City. He is a trader—trades anything. Kelley is still in the jewelry business within two blocks of the bank.

L. G. Kellogg, in his deposition, testified for plaintiff, substantially as follows: Was assistant cashier of plaintiff bank in September, October and November, 1917. Handled the transaction by which there was purchased from John Garrett certain *interim* certificates, which are the subject of this litigation. He bought in some of the certificates, not certain as to the amount, and asked if the bank would take one or more of them, and witness said it would. "He asked me if they were worth their face value, and I said they were, and paid him the cash on them." To the best of his knowledge, Mr. Kel-

ley's employee, a Mr. Milton, came in with a deposit including one or more of these certificates, and asked if the bank would take them, and witness told him it would. In any transaction handled by the witness, "it was either paid in cash, or deposited to the credit of the parties, the full face amount of the certificate." Witness had no knowledge or notice at the time of any fact which would indicate to him, that the title was not good. The bank at that time was paying cash or giving credit for the full face amount of *interim* certificates of the same series as those involved in this litigation to other persons. Could not say whether there was anyone other than Mr. Eagen and himself, who had anything to do with these certificates. Does not remember of giving any instructions to others to pay cash or give credit for full amount of *interim* certificates. There were about 35 employees in the bank at that time. Cross-examination: Witness had no conversation with Kelley or Garrett as to purchasing certificates, prior to purchase. Nor as to from whom or under what circumstances they purchased the certificates. Could not identify any particular certificates purchased from Kelley or from Garrett.

At the close of the evidence, the plaintiff asked several declarations of law, one to the effect, that under the Act of Congress and the regulations of the Secretary of the Treasury thereunder, the certificates were negotiable instruments and passed by delivery and that a bona-fide holder for value acquired a perfect title by purchase thereof. This declaration the court refused. The plaintiff also asked the court to find, as a matter of fact, that the plaintiff acquired the certificates claimed by it, for value in the ordinary course of business, without notice of the fact that they had been theretofore stolen. This request was refused.

The court entered a decree confirming the agreed statement of facts, but there is no finding in the decree, as to whether plaintiff was a bona-fide purchaser for value. There was, however, a finding in said decree, that said certificates were not negotiable. The decree further

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adjudged that the Sullivan bank was the owner of the certificates, and the bonds called for thereby and that plaintiff had no interest therein.

Plaintiff's motion for new trial being overruled, it appealed to this court.

I. It is no longer a debatable question, that either in time of war, or in time of peace, if the exigencies of the Federal Government in the judgment of Congress require the borrowing of money and issuing of bills of credit therefor, Congress has full power so to do, and to issue such bonds, notes or other obligations of the Government, which shall pass from hand to hand, and be negotiable, and have even the quality of legal tender for the payment of debts, as the Act of Congress may prescribe. [Legal Tender Case, 110 U. S. 421.] In that case, as to the form of such obligations, the court says, page 144: "Congress has authority to issue those obligations in a form adapted to circulation from hand to hand, in the ordinary transactions of commerce and business. In order to promote and facilitate such circulation, to adapt them to use as currency, and make them more current in the market, it may provide for their redemption in coin or bonds and make them receivable in payment of debts to the Government." So that, Congress, itself, by an Act of Congress, could have made these *interim* certificates pass current as negotiable instruments from hand to hand, cannot be doubted. Indeed, learned counsel for respondent makes no contrary contention.

II. But learned counsel does contend: First, that the power to make such certificates negotiable is a legislative power or function, which Congress could not delegate to the Secretary of the Treasury; and, second, if it could and did delegate such power, the Secretary did not so exercise such power by the terms he used in such *interim* certificates as to make them negotiable.

**Power of
Congress.**

**Delegation
of Power.**

III. As to the power of Congress to delegate such power to the Secretary of the Treasury. Whether such *interim* certificates should be issued and the character thereof, as to being negotiable or otherwise, we hold, was an administrative matter proper to be vested in the discretion of the Secretary of the Treasury. The purpose of Congress was to raise money to prosecute the World War, and to raise it as expeditiously as possible. The issue of such *interim* certificates or *interim* bonds was a mere detail incident and appropriate to the main purpose for issuing the permanent bonds themselves and might properly be left to the discretion of the Secretary of the Treasury, who was charged with the duty of carrying out the great purpose and undertaking of the Government. It was a proper means to that end and was not prohibited by the Constitution.

In that landmark of the law, *McCulloch v. Maryland*, 4 Wheaton, 421, the power of Congress to create a banking corporation to carry on the financial affairs of the Government, was determined and Chief Justice MARSHALL, in affirming such power, said: "We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

If Congress can create a banking corporation, and give and delegate to it power appropriate or necessary to facilitate and carry on the fiscal operations of the

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Government, as held in this celebrated case, it would seem incontestible, that Congress could give the head of the Treasury Department of the Government, itself, authority in his discretion, to determine whether the securities, ultimate or preliminary, to be issued to raise money under the Act of Congress, in the case before us, should be negotiable.

IV. Did Congress vest the power in the Secretary of the Treasury to make such *interim* certificates, and to make them negotiable? The Act of Congress of April 24, 1917, providing for the issue of the Liberty bonds in question, provided that such bonds should be "in such form and subject to such terms and conditions of issue, conversion, redemption, maturities, payment and rate and time of payment of interest, not exceeding three and one-half per centum per annum, as the Secretary of the Treasury may prescribe."

Sufficient
Language.

We hold, this provision gave the Secretary of the Treasury power as one of the terms and conditions subject to which he might issue said bonds to first issue negotiable *interim* certificates therefor. They were appropriate and adapted to expedite the raising of the funds by the sale of the bonds for cash in advance, and the subsequent delivery of the bonds, when prepared. The bonds themselves were to be negotiable and to give the subscribers of such bonds negotiable certificates therefor, would, and without doubt did, greatly facilitate subscription for the bonds, in that the subscribers would receive, when they paid their money to the Government, a negotiable obligation of the Government, which would pass current and be as valuable as the bonds they subscribed and paid for, and which they could use in place of and with equal facility as the bonds, until they received such bonds.

V. But, it is said, by learned counsel, that in order to make such certificates negotiable, the terms used therein should conform to the common law or to the statute

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Form
and
Terms.

law of the State where issued, which, in this State, required an instrument to be payable at a certain time, and in money, in order to be negotiable, whereas, these certificates called for the delivery of other obligations of the Government, to-wit, Liberty bonds, at an uncertain time, to-wit, when said bonds were prepared, and the certificates therefor surrendered.

But, we hold, that it is not necessary to inquire of the statutes of this State or the common law of England as to making such securities negotiable. Not since the decision of the Supreme Court of the United States in the great case hereinbefore referred to, has it ever been suggested that any other law, save the acts of Congress, had any bearing upon the authority or functions of any department or instrumentality of the Federal Government with reference to its financial operations, or any of its operations. Concerning this question, the illustrious Chief Justice said in the *McCulloch Case*, pages 426-7: "This great principle is, that the Constitution and laws made in pursuance thereof are supreme; that they control the . . . laws of the respective states, and cannot be controlled by them. . . . It is of the very essence of supremacy to remove all obstacles to its action within its own sphere and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." And again, on page 436: "The result is a conviction that the states have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

What the statutes of this State or the English common law provided or required is, therefore, not relevant or germane to the question whether by their terms, said *interim* certificates were negotiable. The only pertinent inquiry is, did the Government of the United States, through the language used by its Secretary of

the Treasury, intend to make them negotiable—pass current from hand to hand—from bearer to bearer — without endorsement — to be “couriers without luggage,” as has been somewhere said by this court. In order to be *interim* certificates, at all, it was necessary that they should be exchangeable for bonds at some time certain or uncertain. There was no law of the United States prohibiting the provisions for such exchange being contained therein, or in any manner prescribing or limiting the contents of such certificates or any negotiable securities to be issued by the United States. Being authorized by the Act of Congress to make such certificates negotiable, in his discretion, if the Secretary of the Treasury used language intended to convey the idea, that they were to be negotiable, that is the end of the inquiry and the end of the discussion.

VI. We hold that the Secretary did so intend, and that such certificates were made negotiable by their terms.

**Delivery
by Bearer.**

Such certificates expressly provide that “upon surrender of this *interim* certificate, the bearer hereof will be entitled to receive, when prepared, definitive bonds in the amount of — dollars, bearing interest from June 15, 1917. This certificate and all rights under and by virtue hereof, shall pass by delivery.” Also that, “There must be no writing on this certificate, until it is presented for exchange for bonds.” So that, clearly the certificates, with the title to the bonds called for, were intended to pass by delivery without endorsement, the same as a bond or note payable to bearer. It was, indeed, expressly provided that the “bearer” of the certificate should on its surrender be entitled to receive the Liberty bonds mentioned therein. Nothing could be clearer than that they were intended to be and, therefore, they were negotiable instruments.

VII. We also hold, that under the evidence, the plaintiff was the purchaser for value in due course, without notice of any defect in the title of its vendors, and,

therefore, the bona-fide owner of the certificates in suit.

**Bona-Fide
Purchaser.**

While the lower court refused to so find, as a fact, when thereto requested by the plaintiff, there was no finding at all on the subject in the decree. In said decree, the court based its judgment against the plaintiff, on the ground, that said certificates were not negotiable. This being a suit in equity, the lower court may have disregarded the request of plaintiff to find the fact of its ownership, as unnecessary, and not because it found plaintiff was not such bona-fide purchaser for value. Otherwise, it seems to us, the court would have expressly so stated in its finding of facts in the decree, which it rendered. In any event, the testimony, not being oral, but by deposition, this court may consider it *de novo*, entirely uninfluenced by the finding of the lower court. When so considered, we are satisfied that the plaintiff was a bona-fide purchaser for value of said certificates, and has sustained the burden, which is upon it, to so prove, in view of the fact that said certificates were previously owned by, but feloniously taken from, the defendant, Sullivan bank.

The result is, the decree of the lower court is reversed, with directions to said court to set aside its judgment heretofore rendered herein, and to enter judgment for plaintiff as prayed, declaring it the owner of said certificates, and the bonds called for thereby, in possession of the court, and that they be delivered to the plaintiff, and that the defendant, Sullivan bank, has no interest therein. *Brown and Ragland, CC.*, concur.

PER CURIAM:—The foregoing opinion by SMALL, C., is adopted as the opinion of the court. All of the judges concur, except *Woodson, P. J.*, not sitting.

JOSEPH J. HARBACEK, Appellant, v. FULTON
IRON WORKS COMPANY and JAMES B. DUN-
CAN.

Division One, April 9, 1921.

1. **CONTRIBUTORY NEGLIGENCE: Definition.** Contributory negligence rests on tort, and is the lack of that ordinary care on the part of a plaintiff which directly contributes to cause or causes his injury.
2. **ASSUMPTION OF RISK: Definition.** Assumption of risk is generally limited to the relation of master and servant, and rests upon contract, either express or implied. It is a separate and distinct defense from contributory negligence, and is differently applied.
3. **PERSONAL INJURIES: Negligence: Failure of Proof.** Where the specific act of negligence charged in the petition was that defendant failed to furnish plaintiff with goggles to protect his eyes while chipping iron with a cold chisel, and the proof was that plaintiff was an experienced workman, knew the use of goggles, saw other men about the premises at the same kind of work using goggles, had been told by the foreman that defendant had in the tool room everything that pertained to the job, had in fact for four months been getting his tools from that room, but had never asked for goggles, *held*, that the proof did not support the charge and the plaintiff was properly non-suited.
4. ———: **Assumption of Risk.** Where the plaintiffs' own evidence showed that the flying of chips or particles of iron from castings when excrescences were chipped off with a chisel was a usual and obvious risk incident to the business, and that plaintiff, an experienced workman, knew this and knew the danger to his eyes, *held*, that he assumed the risk when he entered and continued in the employment of the defendant, and could not recover damages for the loss of an eye.

Appeal from St. Louis City Circuit Court.—*Hon. Frank Landwehr*, Judge.

AFFIRMED.

W. H. Douglass for appellant.

(1) Defendant's foreman was bound to know or at least should have anticipated that particles of iron chipped by plaintiff from castings while in the performance of his duty were apt to strike him in the eyes, un-

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less his eyes were protected, and it was the duty of defendant to furnish plaintiff with goggles, the only known appliance, to protect his eyes. 3 Thompson on Negligence, sec. 3969; Curtwright v. Ruehlmann, 181 Mo. App. 557; Herdler v. Stove & Range Co., 136 Mo. 3; Smith v. Lidgerwood Mfg. Co., 67 N. Y. Supp. 533, 56 N. Y. App. Div. 528; Choate v. Rolling Mills, 27 Ont. App. 155; Thein v. Supply Co., 116 Mo. App. 1. (2) If it was negligence on the part of the defendant to fail to furnish plaintiff with goggles, then plaintiff did not assume the risk and injury as the servant never assumes a risk of injury caused by the negligence of the master. Williams v. Prior, 272 Mo. 613; Fisk v. Railroad, 263 Mo. 106; Patrum v. Railroad, 259 Mo. 109. (3) Plaintiff was not guilty of contributory negligence in continuing to do the work of chipping without goggles, as the danger was not so open and obvious that a reasonably prudent man would refuse to do the work. Jewell v. Bolt & Nut Co., 231 Mo. 176.

Leigh C. Turner, W. E. Moser and Kelley & Starke for respondents.

(1) The court properly sustained defendants' demurrers, because the only allegation of negligence contained in plaintiff's petition upon which recovery could be predicated was not proven by any evidence adduced upon plaintiff's behalf. (2) Under the undisputed and uncontradicted facts in this case, plaintiff assumed the risk of being injured by flying pieces of metal, which was a risk incident to the work in which he was engaged. Johnson v. Brick & Coal Co., 276 Mo. 42; Patrum v. Railroad, 259 Mo. 109; Chrismer v. Bell Tel. Co., 194 Mo. 189; Powers v. Loose-Wiles Co., 195 Mo. App. 430.

ELDER, J.—This is an action brought by plaintiff to recover damages for an injury to his eye, sustained while employed by defendant Fulton Iron Works Company. James B. Duncan, general foreman of the company is joined as a defendant.

At the close of the evidence in behalf of plaintiff, upon the request of both defendants the trial court gave

as to each defendant an instruction in the nature of a demurrer to the evidence, the same being as follows: "At the close of plaintiff's evidence, the court instructs the jury that under the law and the evidence your verdict must be in favor of defendant." Plaintiff thereupon took an involuntary nonsuit as to both defendants, with leave to move to set the same aside. Thereafter, in due time, plaintiff filed his motion to set aside the nonsuit taken. Said motion being overruled, he took an appeal to this court.

The facts, as developed by the testimony offered by plaintiff are as follows: The defendant Fulton Iron Works Company conducts a large iron foundry and steel plant in St. Louis County, of which defendant Duncan is general foreman. Plaintiff testified on direct examination that he was 37 years old; that he worked for the defendant Iron Company from the latter part of March, 1918, until June 20, 1918, the day upon which he was injured; that he was employed as a floor machinist and that his work was to assemble and erect sugar mills, fitting parts and putting them together on the floor of the machine shop; that this floor was about 80 feet square and there were about seventy men in the same room, engaged in the same kind of work he was doing; that at the time he was injured he was fitting a dust guard over a roller which grinds the cane, said guard being formed like a half cylinder, and being about three feet long, eight inches wide and five-eighths of an inch thick. Plaintiff stated that when a guard was placed and it did not fit, it was his duty to chip it and make it fit, the chipping being done with a cold chisel and a hammer by taking the chisel in his left hand, placing it the way he wanted it, and striking the head of the chisel with the hammer held in his right hand; that some days he had to do more chipping than others, that there were days when he did none at all, but that on the average he chipped about three hours a day; that in this instance he was working with a man named Ed Kerns and had been instructed to do the particular chipping by Mr.

Grier assistant to defendant Duncan; that he did not know how long he had chipped on the dust guard in question, but that after he had made a few licks, a piece from the casting he was chipping flew in his right eye; that after the piece of metal struck his eye his fellow-workman Kerns came up and opened his eye and the piece of metal fell out; that after the accident a doctor was called, who looked at the eye and sent him to Doctor Henderson who treated it, after which he went to the office of Dr. Briggs, who took an X-ray picture; that he suffered pain for about six months and that Dr. Henderson treated the eye from the day of the injury until about April, 1919, removing the eye in February, 1919. He further stated that when he was doing chipping, particles chipped off would fly in all directions and you could never tell where they were going to fly; that these pieces had struck him on different parts of the body and he thought that some of them had struck him in the face; that he wore nothing over his eyes while he was chipping; that he never saw any of the floor machinists who did the same work as he was doing wear goggles; that no one told him that there were any goggles there for him to wear while he was chipping; that there were men who worked out in the yard at the plant called "steady chippers," they doing the same work all the time, and that they wore goggles while at work. During the direct examination counsel for plaintiff offered to show by him that since the injury plaintiff had made an effort to get work as a machinist, but that he had been refused because of the fact that he had but one eye. Counsel for defendant objected and the objection was sustained.

On cross-examination, plaintiff testified that he had been working for the defendant Iron Company three or four months before the day he was hurt; that before he began work there he had worked for the Diesel Engine Company, before that for the Cabanne Motor Car Company, and before that for the Dorris Automobile Company, having been a machinist and having handled machinery at

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all those places; that he had been a machinist for five years before going to work for the defendant company and was experienced in that line of work, having so told defendant Duncan at the time he was employed; that when he went to work for the defendant company he knew that he would be required to do some chipping and during all the time that he was employed he did chipping to make castings fit on sugar machines; that Mr. Grier told him, when he first went to work for the defendant company, where the tool room was and had given him checks for the purpose of going to the tool room and obtaining tools; that when he would return the tools to the tool room he would receive these checks back; that in chipping he would measure off the part that was a little too large and that he wanted to chip off or cut off and then with a cold chisel in the left hand and a hammer in the right, would do the chipping; that he selected the place he wanted to chip off and where he wanted to place the blade of the chisel against; that he knew all the time he was employed by the company that, when he set a cold chisel against metal and hit the head of the chisel with the hammer, pieces of iron would fly off, and that he knew that fact before he began work for the company; that he also knew before he went to defendant's plant, and during all the time that he worked there, that he could not tell in which direction the pieces of iron were going to fly and that he had no control of the direction in which the small pieces would fly; that he knew that if one of these pieces struck him in the eye it would hurt his eye; that there was no foreman present directing him where to place the chisel; that before the accident he had chipped similar metal of the kind he was working on when injured; that he had chipped the day before the day of the accident and had no trouble; that the hammer and chisel he was using were all right; that he did not know whether they had goggles in the tool house or not, because he had never asked for any; that he saw other men who were "steady chippers" at defendant's plant wearing goggles all the time that he was employed there; that he knew what gog-

gles were for and knew it when he was employed at defendant's plant; that he knew they were to keep things from getting in the eye, but never asked for goggles while he was there; that he never made any complaint to any one in authority for the defendant company at any time that he wanted or needed goggles; that he did not think it was necessary for him to use goggles when he was chipping.

On re-examination, plaintiff testified that when defendant Duncan hired him, he did not tell plaintiff that they had hammers, chisels, saws, files and all those kind of tools, but he knew that they had tools or they could not run the place; that defendant Duncan and Mr. Grier told him that they had anything that pertained to the job.

John Nieman testified on direct examination that he was then and had been employed by the defendant company for two and a half years; that he did chipping; that no goggles were furnished to the floor machinists that he knew of; that he did not see any machinists doing the work which plaintiff did wearing goggles while they were chipping; that he did not know whether they had goggles in the tool house or not; that he had chipped and fitted parts for the American Steel Foundry and was furnished goggles there. On cross-examination, the witness testified that he had never gone to the tool house and asked for goggles; that he saw that chippers in the yard used goggles; that after plaintiff was injured the defendant company compelled him to wear goggles which he obtained from the tool house.

Edw. A. Kerns testified that he was working for the defendant company as a floor machinist on the day plaintiff was injured and was close to him at the time of the accident; that he heard plaintiff make a noise, went over to him and saw a chip in his eye; that he had been doing the same kind of work about a year and a half before the accident to plaintiff occurred and never saw any of the machinists wearing goggles while they were chipping. On cross-examination the witness stated that he did not know whether there were any goggles in the tool house or not

and that he had never asked for goggles; that he wore goggles sometimes; that he wore glasses, both for the purpose of seeing better and of protecting his eyes; that he never heard plaintiff complain to anyone that he wanted goggles or needed them; that on a previous trial of the case he had testified that there were a few of the men who did steady chipping that wore goggles.

The foregoing outlines the case made.

The specific allegation of negligence pleaded by plaintiff is thus stated in the petition:

"Plaintiff further says that said injuries were directly caused on account of the negligence of the defendants in failing to furnish plaintiff a reasonably safe place in which to work and reasonable safe tools and appliances with which to work in this, to-wit: That defendants knew or by the exercise of ordinary care could have known or should have anticipated that particles of steel when chipped by plaintiff were apt to strike plaintiff in the eye and injure it and had the defendants exercised ordinary care for the safety of plaintiff they would have provided him with goggles, or furnished him other means or method of protecting his eyes from pieces of iron chipped off as aforesaid."

The answer of defendant Fulton Iron Works Company was a general denial, coupled with a plea of contributory negligence, as follows:

"That at and prior to the time when plaintiff is alleged to have been injured defendant furnished to plaintiff and other employees, engaged in chipping iron, goggles which were convenient and accessible to plaintiff and which were adequate and sufficient to protect the eyes of plaintiff and other employees against injury, and that plaintiff was directed and instructed always to wear said goggles while chipping iron, but defendant avers that on said occasion plaintiff, in violation of said orders and instructions, negligently and carelessly failed and omitted to wear said goggles or ask for the same. And defendant states that said acts of negligence and carelessness on the part of plaintiff directly contributed to

cause whatever injuries, if any, were sustained by him on said occasion." The answer of defendant Duncan was a general denial.

I. Plaintiff assigns as errors the action of the trial court: (1) In holding that plaintiff was guilty of contributory negligence as a matter of law; (2) in sustaining defendants' demurrers to the evidence; (3) in rejecting testimony offered by plaintiff; (4) in overruling plaintiff's motion to set aside the involuntary nonsuit.

An examination of these assignments of error in the light of the pleadings and evidence adduced, demonstrates that the real questions are: First, Was the negligence of defendants in failing to provide plaintiff with goggles shown by the proof? and, second, Did plaintiff assume the risk of being injured by flying pieces of metal? If the demurrers were rightly sustained, it must have been upon the ground that, as a matter of law, no negligence of defendants was shown, or, that, as a matter of law, plaintiff assumed the risk.

II. Learned counsel for plaintiff, in his brief, seems to assume that the trial court sustained defendants' demurrers upon the theory that plaintiff was guilty of contributory negligence. However, a careful reading of the record shows that there is nothing contained therein which indicates that the demurrers were sustained on that ground. The record is silent as to upon what ground the court acted. While defendant Fulton Iron Works pleaded contributory negligence in its answer, in this court both defendants urged that plaintiff assumed the risk of being injured, this we presume on account of the construction placed by them upon the evidence adduced at the trial.

While some confusion has arisen in the discussion of the doctrines of contributory negligence and assumption of risk, and while it is sometimes difficult to draw the line of demarcation between them, nevertheless, it is the set-

tled law of this State that these two defenses are separate and distinct and are differently applied. Contributory negligence may be said to be that negligence, or want of ordinary care, on the part of a plaintiff which directly contributes to or causes his injuries. It rests on, and is applicable in actions of tort. Assumption of risk is generally limited to the relation of master and servant and rests upon contract, either express or implied. [Fish v. Railroad, 263 Mo. 124.] In the case of master and servant, contributory negligence, while it implies negligence in the master, further consists in the performance by the servant of some negligent act, or the negligent omission to perform some duty, which materially contributes to, and, in conjunction with the negligence of the master, constitutes one of the elements of, the proximate cause of the injury to the servant. On the other hand, assumption of risk does not involve the negligence of the master, but consists in an ordinarily prudent servant, voluntarily for hire, taking the chances of known or obvious dangers incident to his employment by the master. As was said by VALLIANT, J., in *Curtis v. McNair*, 173 Mo. l. c. 281, in distinguishing the two doctrines upon a question of pleading: "If the plaintiff's suffering was solely from a risk incident to the business, he cannot recover because it was a risk he assumed when he undertook the service, and this fact the defendant may show under his plea of general denial, because by so showing he disproves the allegation of negligence on his part. A special plea that plaintiff assumed such risk is unnecessary. But if the defect in the machinery is obvious or is known, or by the exercise on his part of ordinary care would have been known, to the servant who continued, nevertheless, to use it until the accident occurred, those facts may be pleaded as going to constitute contributory negligence, and in such case if the issue so tendered is found for the defendant, the plaintiff cannot recover, not because he has assumed the risk of his master's negligence, but because notwithstanding the negligence of his master, the law will not allow him to recover when his

own negligence has contributed to the result." And enlarging upon the difference further, as expressed by FARIS, J., in *Patrum v. Railroad*, 259 Mo. l. c. 121: "We have here in Missouri, whether logically or illogically we need not here pause to discuss, come to use the term 'assumption of risk' to express the mere hazards which appertain to a dangerous avocation when unaffected by the negligence of the master. When, however, the servant enters into or remains in the service of the master with actual or constructive knowledge of defects arising from the master's negligence and without a promise of remedy, we speak of this in our Missouri courts as contributory negligence."

With these principles in mind, upon approaching the questions before us, we find at the outset that plaintiff in his petition charges that "had the defendants exercised ordinary care for the safety of plaintiff *they would have provided him with goggles* or furnished him other means or method of protecting his eyes from pieces of iron chipped off as aforesaid." Plaintiff, in his brief, admits that goggles are the only known appliance to protect the eyes and consequently the device for safety which should have been furnished by defendants will be considered as limited to goggles. Furthermore, a proper construction of the language used in the charge would limit the appliance to goggles. Therefore, the negligence attributed to defendants was a failure to provide plaintiff with goggles. Let us then proceed to a consideration of the evidence bearing upon that question in order to determine whether such negligence was proven.

Plaintiff, on direct examination, testified that while he was working for defendant Fulton Iron Works he never saw any of the floor machinists doing the work that he was engaged in wear goggles while they were chipping; that no one ever informed him whether or not there were any goggles to wear while he was chipping; that "there were other men that worked out in the yard at the Fulton Iron Works that did chipping besides the floor machinists. They

Safe
Tools.

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were what they call 'steady chippers.' They do the same work day in and day out. They wore goggles for their eyes while they did this work." On cross-examination, he testified: "I saw other chippers at work in the yard under another boss in the plant of the Fulton Iron Works. They were steady chippers and wore goggles. I saw them during all the time I was there. I knew what the goggles were for and knew it when I went out there. I never asked anybody for goggles while I was there. When Mr. Duncan hired me he did not tell me to get goggles down at the tool house. I never asked the tool house man for goggles." On being asked, "Now, you don't know whether they had goggles in the tool house or not because you never asked for any, did you?" he replied, "No, sir." Further, he said, "I saw a man away up in the corner in the room where I was that ran an emery wheel wear goggles." On re-direct examination, on being asked, "Did anyone at the Fulton Iron Works in authority ever suggest to you that you ought to wear goggles?" he replied, over an objection by counsel for defendant which was overruled, "No, sir." On re-cross examination, he said, that when first employed "they told me they had anything that pertained to the job."

John Nieman, witness for plaintiff, testified on direct examination, that no goggles were furnished to floor machinists. On cross-examination he said, "I never went to the tool house and asked for goggles. I don't know whether they had any goggles in the tool house or not. I saw other chippers out in the yard use them." And, "I never saw the emery wheel man on the floor where we were use them."

Edward A. Kerns, witness for plaintiff, testified on direct examination that no one ever told him that there were goggles in the tool house which he could use if he wanted them. On cross-examination he testified as follows:

"Q. Did you see any machinists who did the same kind of work that you and Mr. Harbacek was doing, I mean, engaged in assembling there, wear goggles when they did chipping? A. No, sir. There are lots of us wear glasses. I have not seen many of them wear goggles."

"Q. You say you have not seen many? Did you see any of them? A. No, there were not many of them.

"THE COURT: Not many? A. No, once in a while I would see a fellow have a pair of goggles.

"THE WITNESS: That is right. That is the men next to the laborers that done the chipping.

"Q. You were in the same department as they were in? A. Yes, sir." Further, he said, "I don't know whether there were any goggles down at the tool house or not. I never asked for goggles at that time. I wore goggles sometimes."

From the foregoing it appears that those employees of defendant Fulton Iron Works who did steady chipping, work largely of the same character as that done by plaintiff, wore goggles; that "once in a while" employees in the same department as plaintiff would wear them; that although there was no evidence as to whom the goggles belonged, it is fair to assume that they were furnished by defendant as plaintiff had been told, when first employed, that defendant had everything "that pertained to the job," and, furthermore, if the goggles had not belonged to defendant, plaintiff would have most likely offered testimony to that effect; that no request was ever made by plaintiff for goggles; and that plaintiff did not know whether defendant had any goggles in the tool room or not. Under his petition the burden was upon plaintiff to prove that defendants *failed to provide him with goggles*, which means nothing more than that goggles must have been procured by defendant beforehand and made ready for plaintiff's use. This, in our opinion, the testimony failed to do. The nearest approach thereto was that neither plaintiff or his witnesses knew whether defendant had any goggles in the tool room or not. On the contrary, the evidence tended to show by plain inference if not directly, that defendant did furnish goggles to some of its employees. Accordingly, we hold that the negligence charged was not proven. It follows that plaintiff was not guilty of contributory negligence.

Counsel for plaintiff contends that defendant Fulton Iron Works Company's plea of contributory negligence admits negligence in said defendant. To this we cannot give assent and the point is ruled against plaintiff. [Peterson v. Railway Co., 211 Mo. l. c. 519, 520.]

III. With reference to the question of assumption of risk, a review of the evidence shows that under the uncontroverted facts in the case plaintiff had had five years' experience as a machinist before he was employed by defendant and understood when he was employed that he would be required to do some chipping; that he had been employed by defendant three or four months before the day he was injured, during all of which time he had been doing chipping of the character he was doing when injured; that some days he did more chipping than on others, but averaged about three hours a day; that the work of chipping was comparatively simple, consisting of smoothing off or removing rough places from castings by placing a cold chisel against the part desired to be chipped off and striking the head of the chisel with a hammer; that no one directed him as to where to place the chisel, he having complete control of the manner in which the chipping was done; that he knew that when he placed the cold chisel against a part of a casting and struck it with a hammer, chips or pieces of iron would fly in all directions; that he knew that if one of these pieces struck him in the eye it would hurt his eye; that he had previously been struck on different parts of the body by such chips and thought that some had struck him in the face; that the cold chisel and hammer used by him were in good condition, with no defects; that he saw other employees who did steady chipping wearing goggles and also saw a man working on an emery wheel on the same floor with him wearing goggles; that he procured his tools from the tool house but at no time asked for any goggles; and that he had never complained to any one that goggles were not furnished him, or that he needed the same.

**Assumption
of Risks.**

An analysis of these facts, when measured by the principles hereinbefore enunciated, leads us to the conclusion that the flying of chips or particles of iron from castings was an usual and obvious risk incident to the business of defendant Fulton Iron Works Company as it was carried on, which plaintiff assumed when he entered and continued in the employ of said company: Without remonstrance, he voluntarily exposed himself to the hazards of the employment, in effect waived the danger and consented to assume it. [Johnson v. Brick and Coal Co., 276 Mo. l. c. 53; Patrum v. Railroad, 259 Mo. 109; Morris v. Pryor, 272 Mo. 350; Chrismer v. Bell Tel. Co., 194 Mo. 189; Powers v. Loose-Wiles Company, 195 Mo. App. 430; Wexler v. Salisbury, 91 Minn. 308; Cripple Creek S. & O. Co. v. Souza, 37 Colo. 393; Illinois Central Ry. Co. v. Young, 124 Ky. 8.]

As was said by Woodson, J., in Johnson v. Brick and Coal Co., 276 Mo. l. c. 53, in speaking of risks incident to employment and illustrating the same in a manner closely correspondent to the facts in the case at bar:

“Such risks are purely incidental to the employment, and is such an injury as is liable to occur at any time during the performance of the work undertaken, unaided in any degree by the negligence of the employer. For instance, should Jones employ Brown as a blacksmith, it would be the duty of the former to furnish the latter with reasonably safe tools or appliances with which to do that work, and it would be the duty of the latter, among other things, to weld iron, and in order to do that it would be necessary for him to heat the ends of the two pieces of iron to almost a white heat, and place them in contact with each other and hammer them together, and as a necessary incident thereto hot scales and sparks will fly therefrom, which would be liable to strike him in the eye and destroy the sight thereof; such a liability would be a risk incident to the work undertaken, in which the employer would have had no part, and which the employee assumed as an implied part of his contract of employment, and for such an injury he could not re-

cover damages from his employer for the reason he assumed the risk. But suppose upon the other hand the injury had occurred to his eye by reason of a sliver of steel flying from a defective and dangerous hammer negligently furnished by the employer while he was pounding the iron mentioned. Such injury would be the result of negligence of the employer."

In *Wexler v. Salisbury*, supra, defendants were the manufacturers of iron beds. It was the duty of plaintiff to chip bed rails, which required him to pound on the same with a hammer to remove ragged edges and pieces of iron which adhered thereto. While so doing a piece of iron flew from the portion of the bed rail which he was striking and injured one of his eyes. Plaintiff claimed that he had not been furnished goggles, in use for persons engaged in such work. It was shown, as in the case under review, that small pieces of iron would, and did continually, fly from the rails when the necessary hammering was done, striking plaintiff's face. From a directed verdict for defendants plaintiff appealed. It was held that the court properly directed a verdict for defendants as plaintiff assumed the risk. The court said, at page 310:

"It is urged that the danger to the eyes of the laborer that arose from the flying particles in the process of the work was so apparent that the risks were assumed by him. Whatever views may be suggested about the policy which underlies the doctrine of the assumption of risks by servants in hazardous occupations, it has been repeatedly held that where a servant enters another's employment, and is put to work at an occupation which is dangerous by reason of plain and apparent risks, which he appreciates, and continues therein, after knowledge of the hazards incurred without objection or promise by the employer to furnish protection he cannot recover damages for injuries arising therefrom."

In *Cripple Creek S. & O. Co. v. Souza*, supra, a servant was engaged in chipping certain rolls of an ore crusher, by using a hammer and chisel as

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in the case at bar. He well knew that pieces of steel flew about the room as they were chipped off. After he had been so engaged an hour or so, upon the request of a co-employee, he surrendered the hammer with which he had been striking the chisel to said co-employee and took a position in the line and direction of the blows. While in this position he was injured by a piece of steel chipping striking him in the eye. Held, that, having continued to work with knowledge of the dangerous character of the employment, and without protest, he assumed the risk.

For the reasons appearing herein, we therefore hold that the trial court properly sustained the demurrers offered by defendants at the close of plaintiff's evidence and that the judgment should be affirmed. It is so ordered. All concur.

PEARL McALISTER v. T. E. PRITCHARD, Appellant.

Division One, April 9, 1921.

CONVEYANCE: Reserving Life Estate: Testamentary. A deed of gift in the usual form of a general warranty deed in fee contained a clause declaring that the land should "remain the property of the grantor during the term of his natural life." This deed was immediately delivered and recorded. Held, that it did not operate a testamentary disposition of the land, but was a present conveyance in fee subject to the life estate only, and took effect immediately upon delivery. A subsequent deed from the same grantor passed his life estate, but nothing more.

Appeal from Dunklin Circuit Court.—*Hon. W. S. C. Walker*, Judge.

AFFIRMED.

Ely, Pankey & Ely and *Orville Zimmerman* for appellant.

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(1) The deed under which plaintiff claims did not convey any present vested interest in the real estate, was not to become effective until after the death of the grantor, and was, therefore, testamentary in character and void. *Murphy v. Gabbard*, 166 Mo. 596; *Aldridge v. Aldridge*, 202 Mo. 572; *Griffin v. McIntosh*, 176 Mo. 392; *Goodale v. Evans*, 263 Mo. 219; *Dawson v. Taylor*, 214 S. W. 852; *Hudspeth v. Grunke*, 214 S. W. 867; 18 C. J. 149. (2) In arriving at the intention of the grantor, resort must be had to the actual language used in the deed which was, in the deed in question, as follows; "The above to remain the property of C. M. Pritchard during the term of his natural life." *Asbaugh v. Asbaugh*, 273 Mo. 353; *McKinney v. Settles*, 31 Mo. 541; *Murphy v. Gabbard*, 166 Mo. 602; *Elsea v. Smith*, 273 Mo. 396; *Goodale v. Evans*, 263 Mo. 219. (3) The intention of the grantor cannot be found to be contrary to the plain meaning of the language used. *Goodale v. Evans*, 263 Mo. 219; *Asbaugh v. Asbaugh*, 273 Mo. 353; *Aldridge v. Aldridge*, 202 Mo. 572. (4) The consideration named in the deed being "One Dollar and love and affection," the transaction was a gift, and the plain meaning of the words used in the deed is too clear for any interpretation other than that the conveyance was to operate as a gift only at the death of the grantor, and, not being in conformity with the Statute of Wills, the deed is void. *Aldridge v. Aldridge*, 202 Mo. 572; *Belgrade v. Carter*, 146 S. W. (Tex.) 964; *Long v. Timms*, 107 Mo. 512; *Speed v. Railroad*, 163 Mo. 111.

McKay & Jones for respondent.

The deed was clearly not testamentary, and could not be affected by the subsequent execution of the deed under which appellant claims. *Wimpey v. Ledford*, 177 S. W. 302; *Wimpey v. Lawrence*, 208 S. W. 54; *Christ v. Kuehne*, 172 Mo. 118; *Dawson v. Taylor*, 214 S. W. 852; *Priest v. McFarland*, 262 Mo. 238; 1 *Dozer v. Toalson*, 180 Mo. 552.

RAGLAND, C.—This is an action to determine the title to the northeast fourth of the southeast quarter of Section Twenty-five, in Township Twenty, north, of Range Nine east, in Dunklin County, and to recover the possession.

The pleadings are conventional. Whether plaintiff has the legal title to the land just described is the main issue; questions relating to the value of the rents and profits are incidental and not the subject of controversy on this appeal.

C. M. Pritchard is the common source of title. On November 16, 1911, he and his wife, for the expressed consideration of love and affection, executed and delivered a deed to Frances Bullock, a daughter of Pritchard by a former marriage, purporting to convey to her the land in controversy. The deed contained this language immediately following the description of the land: "The above to remain the property of C. M. Pritchard during the term of his natural life." In all other respects it followed exactly the form of general warranty deed in general use in this State. Frances Bullock promptly recorded her deed. She died July 2, 1916, leaving plaintiff as her sole heir.

C. M. Pritchard had three other children by the former marriage, and the defendant was one of them. At the time he gave the deed to his daughter Frances, he made and delivered a deed to each of the other three, conveying land to them severally. Each of the deeds was precisely like the one he gave Frances, except as to the name of the grantee and the description of the land. Two years later his wife brought suit for divorce, and pending the suit, May 1, 1913, he executed and delivered to the defendant a general warranty deed purporting to convey to him the land in question and other land. The deed recited a consideration of \$6000. Pritchard died January 16, 1918, and this suit was commenced August 22nd next following.

The cause was tried without a jury. The trial court held that by his deed of November 16, 1911, Pritchard conveyed to Frances Bullock the land in fee, subject to an estate for his own life, which he therein reserved; and that by his deed of May 1, 1916, he conveyed that life estate to defendant. It accordingly gave judgment for plaintiff. Defendant appeals.

I. The sole contention of appellant is that the deed from Pritchard to his daughter Frances Bullock was testamentary in character and therefore revocable at pleasure during his lifetime; and that it was revoked by the subsequent deed to appellant. There is nothing in the form of the instrument, or in its wording, that remotely indicates that Pritchard though he was making a will; nor was there evidence of any extrinsic fact showing that it was his purpose to execute such an instrument. But it is insisted that it is immaterial that he called the instrument a deed and in fact thought it was such. This, because, as it is claimed, the language of the instrument shows that the grantor did not intend to pass to the grantee any present interest in the land; that it was his purpose to retain for the period of his life, not only the use and enjoyment, but the entire title—in other words, that it was his intention that the deed should not become operative until his death.

As showing that it was the grantor's intention that the deed should not take effect until after his death, appellant points to the clause, "The above (referring to the land) to remain the property of C. M. Pritchard during the term of his natural life." If that language were the sole indicia of the grantor's intention we might agree with appellant. But the first rule of construction with respect to either a deed or a will is to ascertain the intention of the grantor or testator from the four corners of the instrument, giving effect, if possible, to every part of it. There is another rule or maxim, sometimes overlooked, and it is this: a court will not be over zealous in trying to find an intention that cannot be given effect without violating positive rules of law—it will, if possible,

so construe an instrument as to give it effect, not destroy it.

There are no express recitals in the instrument under consideration to the effect that it is not to take effect until after the death of the grantor, such as are found in the deeds under review in *Murphy v. Gablert*, 166 Mo. 596, 601; *Givens v. Ott*, 22 Mo. 395, 411; and *Terry v. Glover*, 235 Mo. 544, 547. Nor does it contain any words of similar import. Eliminating the clause, "the above to remain the property of C. M. Pritchard during the term of his natural life," the remaining language of the deed and the conduct of the parties clearly and unequivocally show that it was the intention of the grantor that the deed should take effect as a present conveyance immediately upon its delivery. Is the clause just quoted repugnant to the remaining portions of the deed? or may it reasonably be given a construction that harmonizes with the other parts and by that means effect be given the whole?

Property is *nomen generalissimum*, and extends to every species of valuable right and interest. [6 Words and Phrases (1 series), 5693.] The meaning of "property" is frequently to be discovered from the context of the instrument in which it is used. [22 R. C. L. 37.] It cannot be presumed that the grantor (or his scrivener) used the term "property," as expressive of a metaphysical concept. He must have meant by the expression in which the word occurs, either that he was to continue to be the absolute owner of the land in fee with unlimited power of disposition, or that he merely reserved the right to continue in the possession, use and enjoyment of it during the remainder of his life. If given the first meaning, the expression is repugnant to everything else contained in the deed; if given the second, it is entirely consistent therewith. It seems clear, therefore, that the grantor intended the instrument to effect a present conveyance of the land, subject to his continued possession, use and enjoyment "during the term of his natural life." [*Wimpey v. Ledford*, 177 S. W. 302; *Hudspeth v. Grumke*, 214

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S. W. 365.] This intention should not be defeated simply because it was awkwardly expressed by an unlearned scrivener.

The judgment of the circuit court is affirmed. *Small and Brown, CC.*, concur.

PER CURIAM:—The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court. All of the judges concur, except *Elder, J.*, not sitting.

STEPHENS M. HALE, Appellant, v. ST. JOSEPH RAILWAY, LIGHT, HEAT & POWER COMPANY.

Division One, April 9, 1921.

1. **PERSONAL INJURIES: Street Car: City Ordinances: Humanitarian Doctrine.** In an action against a street car company for personal injuries suffered in a collision between one of the company's cars and plaintiff's wagon, it appeared that ordinances of the city in which the collision occurred provided that the driver of every car should keep a vigilant watch for all vehicles and persons at or near the track or moving towards it, and on the first appearance of danger should stop the car in the shortest time and space possible, and that every car should have a gong and the gong should be rung in quick succession on approaching any team, carriage or person. It also appeared that plaintiff, an aged man, was driving his wagon and horse slowly out of an alley into a street on which the car tracks were laid, and there was nothing to obstruct the view of the approaching car, though plaintiff testified that he did not see or hear it until it was upon him. The motorman testified that his car was going nine or ten miles an hour; that as soon as he saw plaintiff's horse and wagon he sounded the gong, but did not slacken his speed or sound the gong in quick succession until within eight or ten feet of where plaintiff's horse crossed the track, and that the horse was five or six feet beyond the track. The car hit the hind wheel of the wagon and threw plaintiff out. Plaintiff testified that the horse was at no time going at a speed exceeding a fast walk. Witnesses for plaintiff testified that they heard no gong sounded. *Held*, that this evidence presented a question for the jury as to whether the motorman sounded his gong in quick succession, kept a vigilant watch for the plaintiff, and stopped his car in the shortest time and space possible after the first appearance of danger, as required by the ordinance and the humanitarian doctrine.

2. **NEGLIGENCE: Car Company's Duty to be Vigilant.** The fact that plaintiff may have been guilty of negligence in driving on a street car track without looking, or looking carefully, for an approaching car, does not relieve the company of its duty under ordinances which require it to sound its gong, keep a vigilant watch and stop on the first appearance of danger to persons on the street approaching the track.
3. **CONTRIBUTORY NEGLIGENCE: Humanitarian Doctrine.** The fact that plaintiff may have been guilty of contributory negligence in going upon a street car track does not take his case for damages from the jury; the humanitarian doctrine is based upon the idea that the plaintiff may be guilty of contributory negligence and still may recover.
4. **CONSTITUTIONAL LAW: City Ordinance Requiring Vigilance in Operating Street Cars.** It is well settled by the decisions of this court that city ordinances are valid which impose upon motormen operating street cars in the city the duty of keeping a vigilant watch for persons on the track or moving toward it, and of stopping the car on the first appearance of danger in the shortest time and space possible, and of ringing the gong in quick succession on approaching any team or person.
5. **TIMELY WARNING: Awaiting Apparent Peril.** Under the vigilant watch ordinance in evidence the motorman cannot delay the sounding of his gong in quick succession until persons, teams or vehicles are actually going upon the track in front of his approaching street car or are in an actual position of danger; he must take affirmative action to give them timely warning of his approach.
6. **INSTRUCTIONS: Ordinances Regulating Management of Street Cars.** Where, in an action against a street car company to recover damages for personal injuries alleged to have been suffered through the negligence of the company's servants, it appears that there are controlling city ordinance regulating the management of the company's cars and imposing requirements looking to the safety of persons and property, instructions given which ignore these requirements are erroneous; and if such are given on behalf of the defendant, which authorize a verdict for defendant without requiring observance of these requirements, the fact that other instructions are given on the part of the plaintiff authorizing recovery by him if the requirements were violated does not cure the error.

Appeal from Buchanan Circuit Court.—*Hon. L. A. Vories, Judge.*

REVERSED AND REMANDED.

John S. Boyer for appellant.

Defendant's instruction 1 is erroneous. It sets up a different measure of duty for the motorman than that prescribed in the ordinance requiring a vigilant watch for vehicles or persons moving towards the track, and requiring the going to be rung in quick succession on approaching any carriage or person. This instruction excuses the motorman from sounding the gong in quick succession until there is actual danger. This is not the law. The ordinance requires a warning signal in quick succession on approaching any person whether in danger or not. The very purpose of a signal is to warn a person so that he may avoid danger. This instruction is in conflict with plaintiff's instructions 2, 3 and 4. It purports to cover the whole case and directs a verdict, but ignores alleged and proven acts of negligence. *Hovarka v. Transit Co.*, 191 Mo. 441. Defendant's instruction 2 is erroneous. It purports to cover the whole case and directs a verdict but omits alleged and proven acts of negligence *per se*. It entirely omits the negligence of defendant and the duty of the motorman to sound a gong when approaching plaintiff, and authorized a verdict for the defendant even though the jury might find and believe that the motorman violated the Bell Ordinance and that this failure caused the injury. It is in conflict with plaintiff's instructions 2 and 4, denying defendant's duty to sound the gong and permitting plaintiff to recover if defendant's negligence to sound the gong caused the injury. It is also contrary to the provisions of the Vigilant Watch Ordinance and omits the negligence of defendant. It not only excuses defendant from giving a signal when approaching plaintiff, but limits the duty of defendant to bring its car under control and to take steps to avoid the injury only after plaintiff is in actual danger. This is not the law. Independent of the ordinance and where a case is submitted on the humanity rule alone it is for the jury to say whether the giving of an alarm would have aided in preventing the injury, and whether or not the motorman took proper steps to

bring the car under control when in the exercise of proper care he saw, or could have seen plaintiff going into danger. The motorman was not entitled to wait until the danger was imminent. *Holzmer v. Railway*, 261 Mo. 408; *Ellis v. Railway*, 234 Mo. 680; *Dutcher v. Railroad*, 241 Mo. 165; *Kinlen v. Railroad*, 216 Mo. 162; *Cytron v. Transit Co.*, 205 Mo. 719; *Deschner v. Railway*, 200 Mo. 331; *Kinzeman v. Railroad*, 182 Mo. 625.

Robert A. Brown and Richard L. Douglas for respondent.

(1) The ordinance requiring the sounding of a gong upon a street car under certain circumstances, does not require that the gong shall be so sounded on the approach of any carriage or person toward the railway track. It requires the gong to be sounded in quick succession only when the street car is approaching some carriage or person. This necessarily means that the gong shall be sounded in quick succession only when the carriage or person is on the railway track or in a position of peril. It is the well-settled rule that the motorman upon a street car has the right to assume that any person approaching the track will stop and not pass over the same immediately in front of an approaching car, and it is only when a vehicle or person is in a position of danger, or when the motorman can see that such carriage or person will be in a position of danger that he is required to give a warning of danger or to slacken the speed of his car. *Boyd v. Ry. Co.*, 105 Mo. 371; *Draper v. Rys. Co.*, 199 Mo. App. 490; *Flack v. Railroad*, 162 Mo. App. 650; *Frank v. Transit Co.*, 112 Mo. App. 496; *Dutcher v. Railroad*, 241 Mo. 165; *Deschner v. Railroad*, 200 Mo. 331. (2) If plaintiff was guilty of negligence in going upon defendant's railway track under the circumstances disclosed by the evidence, then under the well-settled law of this State, the defendant owed him no duty other than to exercise ordinary care to stop its car and to prevent injuring him. *Grout v. Electric Ry. Co.*, 125 Mo. App. 560-562; *Holland v. Railroad*, 210 Mo. 351; *Moore v.*

Lindell Ry. Co., 176 Mo. 545. (3) When one testifies that he looked for an approaching car and saw none, when the facts show that had he looked he must have seen, the Courts say that he in fact did see, and that his statement to the contrary will avail him nothing. *Peterson v. Rys. Co.*, 270 Mo. 75; *Murray v. Railroad*, 176 Mo. 183; *Mockowik v. Railroad*, 196 Mo. 550; *Underwood v. West*, 187 S. W. 86.

SMALL, C.—Suit for personal injuries arising from collision with defendant's street car in the City of St. Joseph.

The petition alleged: That on January 30, 1918, plaintiff was driving a horse and wagon across defendant's railway tracks on Lafayette Street between 16th and 17th Streets. That before plaintiff had an opportunity to entirely cross said tracks, and without any signal, warning or notice to plaintiff, defendant's servants negligently and unlawfully ran one of defendant's street cars against the wagon in which plaintiff was riding, with great force and violence, whereby plaintiff was thrown from the wagon and greatly injured. That defendant's servants in charge of said car, either saw him and his vehicle on the tracks or approaching the tracks of defendant, or by the exercise of proper care could have seen him and said vehicle in time to stop the car before striking the wagon. That said servants of defendant carelessly failed to keep a vigilant watch for vehicles and persons, either on the tracks or moving toward them, and carelessly failed to stop said car in the shortest time or space possible on the first appearance of danger to plaintiff, and carelessly failed to sound a gong or give any warning to plaintiff of the approach of said car. By reason of all which plaintiff was injured. That all of said acts of defendant were in violation of the ordinances of the city of St. Joseph, Missouri, and in violation of the law of the land. Plaintiff asked judgment for \$10,000.

The answer admitted the ownership of the street car which collided with the plaintiff, denied all other allegations of the petition, and pleaded contributory negligence.

The plaintiff testified: That he was employed by his sons. Kept his horse and wagon at home between 16th and 17th Streets. That about one o'clock, on the day he was injured, he hitched his horse to go to the shop, and started north along the alley back of his house. The alley was a little up grade going north to Lafayette Street, which had double street-car tracks on it. The street cars turned onto Lafayette Street, coming north, half a block from where this alley intersected Lafayette Street. Plaintiff drove directly north, and when he got out of the alley, so he could see, there being a building on the southwest corner of said alley and Lafayette Street, he looked on the street and saw no car and heard no bell. He drove right along at the regular gait, did not see or dream of any danger. The horse was old, but "fairly at himself in every respect." He had driven the horse about ten years. The first he knew of the street car was when it was all over and somebody sat him up in the wagon. He thought he was able to go on to the shop. When he got there and got out of the wagon, he fell to the ground from his injuries, and was suffering with pain in his shoulder, neck and head. The street car people came after him and took him down to the doctor's office, where they gave him medical treatment for about three weeks. He was hurt in the hip and the side and otherwise. On cross-examination, he said: The barn where he kept his horse and wagon bordered on the alley and when he got to Lafayette Street, he looked and saw nothing from either way, nothing on the street at all, and heard no noise. He knew the car tracks were there. He had to pass the big barn on the southwest corner of Lafayette Street and the alley to look west. At that time, the horse's head would be passed the middle of Lafayette Street, between the curb and the middle of the street. From

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the barn to the south track was about 20 feet. The entire length of the horse was out in the street before he could look west. Looked west, but not until he could see all the way through; when he looked he saw clear down to 16th Street, which was one-half a block away. The car that went east came north on 16th and then turned east on Lafayette Street. Guessed cars cannot go fast around corners; they slow down then. When he looked west and saw no car on Lafayette Street, he went straight across the tracks. Did not look west after that. Did not know the car struck his wagon, until after he came to sitting in his wagon. Did not see nor hear the street car before it struck. His hearing was pretty good, "fair to middling, or a little better." His sight very good. No wagons on the street. Nothing to prevent his seeing down to 16th Street. His horse walked tolerably fast across the street. Witness was here shown a paper, which he said he did not sign. The signature shown him did not look exactly like his; if he wrote it, it was when "I didn't know anything." It was not his writing at all. Witness denied stating to anyone that as he drove into Lafayette Street he heard a car turning at 16th Street. Also denied stating he had time to cross the tracks, and that when his horse was on the track, he started to hurry the horse across and he slipped and before he could get his footing the car collided with the wagon, and threw plaintiff to the pavement; or, stating, that when his horse was on the tracks, a car was just turning east on Lafayette Street. He saw the street car there after the accident. Did not see the motorman or conductor. He was 81 years old. The accident happened in January, 1918.

Mrs. Augusta Emke, testified for plaintiff: That she lived at 18th and Lafayette Streets. She was on the car which struck plaintiff. She was sitting in the front. She heard a bump and looked, and the street car went into the hind wheels of the wagon and she saw the man fall out in the street. She got out of the car and went home immediately. The collision happened between 16th

and 17th, near the place where the alley would cross the street. The man was thrown up in the air. She heard no bell nor gong ringing before the collision. Did not know or notice whether the car slackened any after it turned into Lafayette Street, before it hit the wagon. The car was past the alley when it stopped; even with the telephone post on the right hand side of the street. On cross-examination, the witness said: The car was going east. Witness was sitting on the right hand side of car, the south side. Did not know whether the car slowed down. Did not hear any bell, but had heard it ringing at 15th and 16th Streets, when they were there on Penn Street. She did not listen for a bell, but did not hear any just before the accident. Car hit the hind wheels of the wagon. Did not know the man. Conductor did not get her name, she ran off. Besides herself, there was one man on the car. Accident happened January, the year before the trial.

W. A. McNeely, testified for plaintiff: He was a passenger on the car. Sat on the north side at the rear. Did not see collision, but heard and felt the shock. It was right where the alley intersects Lafayette Street between 16th and 17th Streets. The horse and wagon were on the north side of the south track after the collision; the wagon practically on the north track. Could not say whether the gong sounded before the collision, but he never heard it. He presumed he could have heard it, had it been sounded. The car was 10 or 15 feet east of the alley, when it stopped. Eastward Lafayette Street was down grade from 16th Street; quite a sharp decline for the first block. On cross-examination, witness said: Did not notice the rate of speed. Did not pay attention to ascertain whether bell was ringing on the car; would not say it did not ring; all that he would say, was, that he did not hear it. If the bell had rung, he might not have heard it; it was an even chance. After accident, plaintiff did not seem to know what he was doing, but drove off.

C. C. Madison, for plaintiff, testified: He was about one-half a block away, when the accident happened. Had

known plaintiff for six or seven years. First thing he knew was when he heard the car hit the wagon, he was at the northwest corner of 16th and Lafayette Streets. The whole block is about 300 feet long. Lafayette Street is about 40 or 50 feet wide; never measured. He went up to the place of accident and found Mr. Hale lying on the ground on the north car track. Rear end of the car was 10 or 12 feet east of east line of alley. Prior to collision, witness heard no bell ring. On cross-examination, witness said: Did not know about any bell ringing, paid no attention. Had come from the south on 16th Street, when he got to the northwest corner of 16th and Lafayette he heard the collision, prior to that, he had paid no attention whether bell was ringing or not; would not say bell was not ringing.

Dr. Hansen testified for plaintiff: He had been plaintiff's family physician. He was at plaintiff's residence when Mr. Teigh, defendant's representative, came to plaintiff's house the day of the accident. Teigh talked to plaintiff as the doctor was strapping plaintiff's back. Teigh told plaintiff he would like to have a statement of the accident, which plaintiff undertook to give. He remembered plaintiff said to Teigh, that the horse slipped on the track, but for which he would have gotten across. After statement was written, plaintiff signed it; he was perfectly conscious at the time. The witness was bandaging and dressing plaintiff, when the claim-agent was writing out the statement. Plaintiff was suffering at that time. Witness was a regular surgeon of the Street Railway Company, and had been for 16 years. Teigh brought the plaintiff in a taxi. Witness did not recollect that plaintiff said he whipped his horse. Remembered hearing plaintiff tell Teigh, that he heard no bell ring.

Plaintiff read in evidence Sections 1071 and 1078 of the Revised Ordinances of 1905 of the City of St. Joseph, which were as follows:

"Sec. 1071. . . . Fifth. The conductor or driver of each car shall keep a vigilant watch for all vehicles

and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such persons or vehicles, the car shall be stopped in the shortest time and space possible.

"Sec. 1078. Cars to be fitted with gong—to be sounded, when—penalty. Every person or corporation owning or operating any street railway in this city, running cars, propelled by electricity or other power, shall cause every car or vehicle owned or operated by them to be fitted with a gong. It shall be the duty of such person or corporation to cause the gong on such car or vehicle to be struck or rung in quick succession on approaching any team, carriage or person, and approaching any street crossing within the city. Any driver, motorman or other person, having charge of any such car or vehicle, and failing to strike such gong as herein provided, shall be fined for each offense not less than five dollars nor more than fifty dollars. [R. O. 1897, Chap. 62, Art. 1, Sec. 10.]"

On behalf of defendant, the motorman testified:

"Q. I believe on the day of the accident your car had come from 16th Street and was going north on Lafayette? A. Going east.

"Q. I mean east—I wish you would tell the jury where the plaintiff in this case was, or his horse, when you first saw it? A. I was about 50 feet, I guess, back from the alley.

"Q. West from the alley? A. West from the alley going east. I noticed the horse coming out of the alley and I began ringing my bell. Of course, the horse was going slow and I supposed he were going to stop. I had gotten about 8 or 10 feet, probably, of him and he began slapping his horse with his lines and the horse lunged out but it was too late for me to stop. I done everything I could then but it was too late. I judge I was about 12 feet from the vehicle, and I hit the wagon and the car run something like that distance after I hit the wagon.

"Q. When you saw this man whipping his horse in the manner you have described what did you do then

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about your bell—if anything? A. I kicked the bell rapidly and began working my car to stop it the quickest way.

“Q. Did you pay particular attention to how far your car ran after you struck the wagon, notice anything? A. Not particular but not very far, because I was in a hurry to get out to assist Mr. Hale to see if he was hurt bad and got to him immediately.

“Q. About what rate of speed was your car running as you proceeded east on Lafayette Street? A. Ordinary rate of speed about nine or ten miles an hour out there.

“Q. You say the ordinary rate of speed is 9 or 10 miles an hour out there? A. I judge that was about the speed I was going. . . . “Q. What is located on the southwest corner of Lafayette Street and the alley, if anything? A. Shed or barn there.

“Q. What effect does that have on any one coming out of the alley—can you see them until they get out past that barn or shed there? A. Not after you get behind the barn you can't see them until they get out in the street.

“Q. Did you know who the man or woman was on your car? A. No, sir.

“Q. I wish you would tell the jury whether or not when you rang your gong when the man first came out into the alley whether or not Mr. Hale looked at you or in your direction? A. He looked right towards the car.

“Q. Would you tell the jury just what he did when his horse got closer—he whipped up—what did he whip u_ with? A. Just the lines.

“Q. And when he struck the horse what did the horse do? A. Started to try to lunge across the track.

“Cross-examination by Mr. Boyer.

“Q. How fast was the horse going when you first saw it? A. Well, a moderate walk.

“Q. The grade of the alley towards the car tracks is up hill, is it not? A. I believe there is some incline.

“Q. The horse was drawing the wagon and Mr. Hale up hill into Lafayette Street? A. Yes, sir.

"Q. You saw the horse coming out of the alley? A. Yes, I noticed the horse's head just as he came out from behind the shed. "Q. Is that the first you saw of Mr. Hale coming up the alley? A. Yes, sir.

"Q. The first you had seen him? A. Yes, sir.

"Q. Did the horse's speed change any from that time until the time he was right near the track? A. No

"Q. Continued just the same as he had been until he was very near the track? A. Yes, until he was in 5 or 6 feet.

"Q. Where was the horse when you saw Mr. Hale whip him up with the lines? A. His head was about 4 or 5 feet of the south rail.

"Q. Very close to the rail, was it? A. Five or six feet, yes.

"Q. Where was your car from him at that time? A. About 50 feet back, I guess—not 50 either, about that time about 10 or 12 or 15 feet, along there.

"Q. Now the speed at which the horse was going from the time you first saw his head coming out of the alley until he got onto the track or very near the track never changed—he continued to walk slowly all that distance, did he? A. The way it seemed to me, Mr. Hale looked around and he noticed that the car was coming and began to slap the horse and the horse's head then was five or six feet south of the south rail.

"Q. And you say at that time you were only within ten feet of him? A. Yes, ten or fifteen feet.

"Q. As you were approaching this alley, I understand, you saw the horse's head coming out of the alley? A. Yes.

"Q. You continued to run your car down Lafayette Street? A. Yes, sir.

"Q. And the horse kept coming at a slow walk towards the track until it was within about five feet of the track? A. Yes.

"Q. And your car was still running as it had been before—had you slackened the speed any? A. No, sir, I was just coasting along.

"Q. Had you put the brake on? A. Well, no.

"Q. You were running slightly down grade? A. Yes.

"Q. What kind of brake was on the car you were driving. A. Air brake.

"Q. Was the air working? A. Yes.

"Q. You applied it and stopped the car, did you? A. Yes.

"Q. After the collision? A. During the collision.

"Q. As a matter of fact you didn't stop until after the collision, did you? A. No.

"Q. Your car struck the wagon and then you ran on by some distance? A. Didn't have time.

"Q. When did you begin to try to stop your car? A. When I seen the man was going to try to run across the track ahead of me.

"Q. That is when you were within ten feet of this horse you then began to try to stop your car? A. Then is when he started to whip the horse. As soon as I saw him start to whip I seen he was not going to stop.

"Q. Let's get this correct—when you were within ten feet of Mr. Hale's horse, you then began for the first time to try to stop the car—is that right? A. Ten or fifteen feet.

"Q. Did you put the air on? A. I did then, sure.

"Q. And that is the first time you put it on? A. Yes.

"Q. How fast did you usually run your car around 16th Street into Lafayette and down east on Lafayette Street—what was your usual speed running down there? A. The usual speed I guess was 9 or 10 miles per hour. Of course you go slow around the curve. . . .

"Q. Isn't it a fact, as you stated it a while ago, that you didn't ring your bell until you were within ten feet of Mr Hale? A. That is when I rang it rapidly.

"Q. Began to stamp it with your feet—ten feet is about as far as you are from me, is it not? A. I judge nine or ten feet.

"Q. And that is the first time you rang this bell in quick succession? A. When I seen he was not going to stop. He was looking right at the car.

"Q. Did you ring it in quick succession until within ten feet of Mr. Hale's horse? A. I rang it in quick succession when I seen he was going to make the attempt to cross ahead of me.

"Q. That is, when you were within ten feet of him? A. Ten or fifteen feet.

"Q. And that is the first time you rang the bell in quick succession, was it? A. Well, yes, first time I remember.

"Q. How fast was this car going? A. When it collided with the wagon?

"Q. Just a little before the collision and as you saw him approaching and as you were approaching him, how fast were you running? A. As I say, about nine or ten miles.

"Q. Why didn't you ring the bell on this car when you first saw the horse coming out of the alley towards the street car track? A. I did but I didn't ring it rapidly.

"Q. You think you were 50 feet west of the west line of the alley when you first saw the horse coming out of the alley? A. Yes.

"Q. How far is it from 16th Street to the alley where the collision happened? A. Half a block. I don't know the distance of a block there.

"Q. Is it the usual ordinary length of a block? A. It is an ordinary block.

"Q. About 120 feet, or 140? A. I don't know what length the block is; about 300 feet for the block and 150 feet for a half block.

"Q. How wide would you say the alley is? A. The alley is about 19 feet wide, I guess, or 20.

"Q. Who was your conductor? A. Schaeffer.

"Q. Was your air working well that day? A. Yes, sir, working good.

"Q. As a matter of fact, wasn't there some defect? A. No, defect.

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"Q. Did you have sand on your car? A. I did.

"Q. Did you use sand in the endeavor to stop your car? A. Yes, air and sand. . . .

"Q. Let us not be mistaken about it—when you were 10 or 15 feet from the horse you say the horse lunged forward and you then immediately began to try to stop your car and did stop it in the shortest space possible—is that correct? A. Yes, sir.

"Q. Now how far did your car run before you stopped? A. I didn't measure the distance; don't know exactly, but not very far.

Q. Give the jury an idea. A. Might have been 20 feet, might have been 15 or 25, but it was not very far.

"Q. You ran by the alley, didn't you? A. Not very much, if any.

"Q. How much beyond the valley did the rear of your car go before you stopped? A. I don't think the rear of the car went beyond the alley.

"Q. You don't think the rear of your car crossed the alley? A. No.

"Q. Are you positive about that? A. Very positive, yes, sir. . . .

"Q. So you would say that about half of your car passed over the east line of the alley—is that your estimate? A. Something like that, yes, sir."

The conductor testified for defendant: The first he noticed was the rapid sound of the gong. Plaintiff had come out of the alley then, and was in the street five or seven feet from the car track. He was whipping his horse. The bell had been sounded all along after the turn into Lafayette Street. Saw the old man fall, but could not see the car hit the wagon. On cross-examination, witness said: It was a clear day. When the mottorman sounded the gong in quick succession, Hale was within 6 or 7 feet of the car track, and the car was within 10 or 15 feet of him.

Mr. Teigh, claim-agent for defendant, testified: That he wrote up a statement of the accident given to him by the plaintiff which was read over to the plaintiff,

as well as being read to him as it was written, and which plaintiff signed (statement is not copied in the record).

In rebuttal, plaintiff's evidence, that of the witness De Ford, was as follows: He had been a street car motorman for eleven years, and that the car in question, going ten miles an hour under the circumstances shown in evidence, should have been stopped within the length of the car, and that the car was 38 or 40 feet long. He was never discharged, but quit the company voluntarily.

The court gave the following instructions for the plaintiff:

"3. The court instructs the jury that if you find and believe from the evidence in this case that the plaintiff was, on or about the 30th day of January, 1918, driving a horse and wagon across the street car tracks of the defendant company, in a public street in the City of St. Joseph, Missouri, and that prior to the collision mentioned in evidence the plaintiff was upon or near to the said street car tracks of the defendant, and in a place of danger from approaching street cars; and if you further believe that the agents and servants of defendant company in charge of the street car which collided with plaintiff's wagon, failed to keep a vigilant watch for plaintiff and the vehicle in which he was riding, and upon the first appearance of danger to plaintiff or said vehicle, said agents and servants failed to stop said street car in the shortest time and space possible, and as a consequence thereof said car struck the wagon mentioned in evidence and injured plaintiff; and if you further find that plaintiff was not guilty of any negligence which contributed to his own injury, then your verdict must be for the plaintiff and against the defendant.

"4. You are further instructed that if you find and believe from the evidence in this case that prior to the collision mentioned in evidence the defendant's street car was approaching plaintiff and the wagon in which he was riding, and while so approaching, the agents and servants of defendant company then in charge of said

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street car negligently failed to strike or ring in quick succession a gong upon said street car, and as a result of such failure to ring said gong in quick succession the car struck the wagon in which plaintiff was riding and injured plaintiff, and if you find that plaintiff was not negligent, as defined in other instructions, then your verdict must be for the plaintiff and against the defendant company.

"5. If you find and believe from the evidence in this case that defendant's motorman in charge of the street car at the time of the collision mentioned in evidence either saw plaintiff, or by the exercise of ordinary care could have seen him either on or approaching the street car track and in a position of danger from passing cars, in time to have stopped the car by the exercise of ordinary care and with the means at his command before striking the wagon in which plaintiff was riding, and if you believe that said motorman negligently failed to stop said car after having seen plaintiff in a perilous position or by the exercise of ordinary care could have seen plaintiff in a position of danger, and in consequence of said negligence plaintiff was injured, then plaintiff is entitled to a verdict in this case, even though you may believe that plaintiff did not exercise the care for his own safety, in driving on or near said street car track, that an ordinary prudent person would have exercised under the same circumstances."

On behalf of defendant, the court instructed the jury as follows:

"1. The court instructs you that the defendant railway company had the right of way over its tracks and that it owed plaintiff no duty whatever to stop its car or to slacken its speed until its agents in charge thereof saw, or in the exercise of ordinary care could have seen that plaintiff intended to drive upon its tracks ahead of the car and put himself in a position of danger, and if you believe from the evidence that as soon as its motorman saw, or in the exercise of ordinary care could have seen that plaintiff was going to drive on the tracks ahead

of the car or be in a position of danger he sounded the gong upon the car in quick succession and exercise ordinary care to stop his car in the shortest time and space possible consistent with the safety on his passengers and the machinery of the car, then under no circumstances can plaintiff have a verdict in this case, and your finding must be in favor of the defendant.

"2. The court instructs the jury that the mere fact that defendant's motorman saw plaintiff approaching its car tracks did not obligate the motorman to stop his car or to slacken its speed. Such motorman had the right to presume that plaintiff would not negligently drive upon the tracks where he would be struck by the car and that he would stop before going upon the tracks. The motorman had the right to so think and act until he saw or in the exercise of ordinary care could have seen that plaintiff was going upon the tracks ahead of the car or would be in a position of danger, and if you believe from the evidence that such motorman then exercised ordinary care to stop his car in the shortest time and space possible consistent with the safety of his passengers and the machinery of the car, then you must find your verdict for the defendant.

"3. You are instructed that the plaintiff had no right to rely solely upon any obligation which must have rested upon the defendant or its agents to prevent injuring him, and that it was his duty to exercise ordinary care to look out for his own safety, and if you believe from the evidence that plaintiff was guilty of negligence in diving upon defendant's tracks in front of defendant's car in the manner described in evidence, and that after plaintiff had placed himself in a position of danger, the defendant through its agents exercised ordinary care to stop the car and prevent injuring plaintiff, then he is not entitled to a verdict in any sum and your verdict must be in favor of the defendant.

"4. The court instructs you that the agents of the defendant operating the car described in evidence were only required to exercise such care in the management

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and operation of the car as would have been exercised by a reasonably prudent person under like or similar circumstances, and if you believe from the evidence that defendant's agents in charge of its cars were in the exercise of such ordinary care at the time of the accident complained of as would have been exercised by a reasonably prudent person under like or similar circumstances, then you must find your verdict in favor of the defendant."

The jury found a verdict for defendant, and plaintiff appealed to this court.

I. We think there was evidence to go to the jury, both under the humanitarian doctrine and ordinances of the City of St. Joseph introduced in evidence by plaintiff, requiring the motorman to keep a vigilant watch for persons moving towards the track, and to sound his gong in quick succession, when he was approaching teams, carriages and persons. The motorman testified, he was going nine or ten miles an hour and did not slacken his speed, nor sound his gong in quick succession until within eight or ten feet of where plaintiff's horse crossed the track, and said horse was five or six feet south of the track. All the evidence shows, the car hit the hind wheel of the wagon. Therefore, the horse and wagon moved 20 or 25 feet, while the car was moving the last eight or ten feet before the collision, according to the motorman's evidence. From this it might be inferred, that the motorman was in error, when he said he applied the air and sounded his gong in quick succession, while the horse was yet five or six feet south of the track, as it is not likely the horse traveled twice as fast as the car. Plaintiff testified, that the horse at no time was going at a speed exceeding a fast walk. If so, it might be reasonably argued that the horse and, perhaps, the wagon was actually on the track before the motorman slackened his speed or sounded his gong in quick succession. Furthermore, plaintiff testified, he saw or heard nothing of the car or gong, and crossed the street wholly oblivious of danger. His witnesses also testified, they heard no gong sounded at all. So that,

in any event, there was a question for the jury as to whether the motorman sounded his gong in quick succession, kept a vigilant watchout for the plaintiff, and stopped his car in the shortest time and space possible after the first appearance of danger, as required by said ordinances and the humanitarian doctrine.

II. But defendant says, that plaintiff testified, that he looked west after he passed the barn and did not see the approaching car, and there being no obstruction, plaintiff's testimony on that point is contrary to the physical facts, because his eyesight being good, he must have seen, had he looked. Therefore, he must be charged with seeing the car, as a matter of law, and that if he saw the car, then the failure to sound the gong was immaterial, citing *Peterson v. Railways Co.*, 270 Mo. l. c. 75; *Murray v. Transit Co.*, 176 Mo. 183; *Mockowik v. Railroad*, 196 Mo. 550.

In each of these cases, the plaintiff testified, that he saw the car and the court held, therefore, that he needed no further notice of its approach and the sounding of the gong would have added nothing to his safety or knowledge of his danger. But in this case, the plaintiff says, he did not see the car, although he says he looked, under circumstances in which we agree with defendant that he must have seen the car, had he looked. But it does not follow from this, that the law presumes he looked and saw the car and wilfully ran into certain danger, rather than that he failed to look at all or looked so carelessly and inefficiently as to amount to not looking at all. The precise point involved—we cannot find—has ever been up for adjudication, but in laying down the proposition that “when to look is to see, it is of no avail for plaintiff to say he looked and did not see,” and the plaintiff testifies, he did look, but failed to see, this court in one of the first and most thoroughly considered cases, *Kelsay v. Railroad*, 129 Mo. l. c. 374, said: “One of two facts is true: Either the plaintiff did not look with that care common prudence required of her, or she did not look at all, until too late to avoid the collision.”

So, in *Hayden v. Railroad*, 124 Mo. 573—"where to look was to see"—the court assumed the deceased failed to look, rather than that he looked and saw and ran into danger wilfully or heedlessly. The court said, p. 573: "It will thus be seen that it was a physical impossibility for the deceased to have failed to see the approaching train, if he had looked in that direction. . . . Had he done so, there can be no question that he could and would have stopped his team until the train passed and then crossed over in safety." So in *Hill v. Union E. L. & P. Co.*, 260 Mo. l. c. 103, where the *Kelsay Case*, 129 Mo. supra, is cited in the dissenting opinion of GRAVES, J., in which FARIS, J., concurs, it is said: "Had plaintiff looked as he proceeded up this pole, this case would not be here. . . . As plaintiff went up the pole had he looked at each step before touching it, the trouble would have been averted."

Of the two presumptions, it is most probable and reasonable, that plaintiffs so testifying in such cases failed to look at all, or looked so carelessly they did not see, rather than that they looked and saw the danger and plunged forward into it. So that, we must rule, that the fact, that plaintiff may have been guilty of negligence in driving on the track without looking or looking carefully for the approaching car, does not relieve defendant from its duty under said ordinances to sound its gong in quick succession, and keep a vigilant watch and stop on the first appearance of danger to persons on the street approaching the track as in said ordinances provided.

III. The fact that plaintiff may have been guilty of contributory negligence in going upon the track, does not take the case from the jury, because the humanitarian doctrine is based on the idea that plaintiff may be guilty of such contributory negligence and still the plaintiff can recover. The ordinances introduced in evidence, simply relate to the defendant's duty in oper-

Contributory Negligence. ating its cars, and apply to cases where the plaintiff invokes the humanitarian doctrine as well as ordinary cases of negligence where that doctrine is not applicable or involved at all.

IV. That said ordinances are valid and prescribe the duty of the motorman in operating said car, and Validity. that it was negligence *per se* on his part, if he violated them, is well settled by the decisions of this court. [Sluder v. Transit Co., 189 Mo. 107; McHugh v. Transit Co., 190 Mo. 96; Hovarka v. Transit Co., 191 Mo. 441; Cytron v. Transit Co., 205 Mo. 716-19.]

V. (a) Instruction No. 1 given for defendant was erroneous, because it only required the motorman to Instructions. sound his gong in quick succession in case the motorman saw or could have seen by the exercise of ordinary care "the plaintiff *was going to drive onto the track* ahead of the car or be put in a position of danger." Whereas, said ordinances construed together, required the motorman to sound his gong in quick succession, when he discovered or by the exercise of a vigilant watchout ahead could discover that he was approaching persons, teams or vehicles who were moving towards, and who might go upon, the track or get into actual danger, so as to warn them from so doing, and he cannot wait before so sounding such gong in quick succession until they are actually going to drive upon the tracks or are in an actual position of danger. Said instruction should have so informed the jury.

(b) Instruction No. 2 given for defendant was erroneous because it entirely ignored said ordinance requiring the gong to be sounded by the motorman and stated that the motorman had a right to presume that plaintiff would stop before going on the tracks. As we have just seen, said ordinances required affirmative action on the part of the motorman to give timely warning to persons moving towards the tracks of his approach, so that they would stop before going on the track. He had no right

to remain inactive and to presume they would so stop. Said instruction should not have been given.

(c) Instruction No. 3, given for defendant ignored both said ordinances of the city and did not require defendant to do anything to prevent injuring the plaintiff until the plaintiff had placed himself in a position of absolute danger.

(d) Instruction No. 4, given for defendant, also wholly ignored both of said ordinances. Said instructions Nos. 1, 2, 3 and 4, given for defendant, were, therefore, erroneous. [Cytron v. Transit Co., 205 Mo. 716-719; Hovarka v. Transit Co., 191 Mo. 441, l. c. 452 *et seq.*]

VI. The fact that plaintiff's instructions Nos. 3 and 4 authorized a recovery for plaintiff, if said ordinances were violated, does not cure the vice of the instructions aforesaid given for the defendant, because each of said instructions directed a verdict for the defendant without reference to said ordinances. They were simply contradictory to and neutralized the effect of the said instructions given for the plaintiff based upon said ordinances. "They wiped them out, as with a sponge." [Cytron v. Transit Co., 205 Mo. 716-19.]

For the errors aforesaid, the judgment is reversed and the cause remanded for another trial in accordance with the law as indicated in our opinion. *Brown* and *Ragland, CC.*, concur.

PER CURIAM:—The foregoing opinion by SMALL, C., is adopted as the opinion of the court. All of the judges concur.

THE STATE ex rel. OZARK POWER & WATER COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION and J. D. BROOKSHIRE HARDWARE COMPANY.

Division One, April 9, 1921.

1. **PUBLIC UTILITY: Compulsory Service: Unelected Territory.** The Public Service Commission has no power to make an order compelling an electric light company to furnish electricity to a town which is not a part of the territory it has undertaken to serve. Such compulsory service would be tantamount to an appropriation of the company's property to a public service to which it has not been dedicated, and would amount to the taking of private property for a public use without just compensation. But on the other hand, if the town is territory comprehended within the company's profession of service it may be required to serve it, because it is its duty, within reasonable limitations, to serve all in such territory who apply.
2. ———: ———: ———: **Question of Fact.** Whether or not an electrical company has undertaken to supply electricity to a certain territory is a question of fact to be determined by the evidence before the Public Service Commission, and will be determined by the Supreme Court, on review, unhampered by the findings of either the Commission or the circuit court; and where there is no express declaration of the territorial limits of its service, the fact may be determined by its charter and what it has done thereunder.
3. ———: ———: ———: **Charter Provisions.** The charter of a public service company empowering it "to generate, distribute and sell electric energy in Missouri and elsewhere, and to do all things incident thereto" is merely permissive, and does not require it, upon demand, to distribute and sell electricity everywhere in Missouri, nor can it be reasonably inferred that by accepting such charter power it undertook to furnish service in all parts of the State. But where, upon receiving such charter, it proceeded to localize the territory in which it proposed to operate, and applied for and received a franchise permitting it to erect poles for the suspension of electric light and power wires on and along the public roads and highways of Newton County, and obtained pole-line rights-of-way in Jasper, Lawrence, Christian, Greene and

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Taney counties, applicable to all highways alike, it will be held that it obtained franchises that covered all the highways in said counties, including the streets and thoroughfares of the town of Diamond, in Newton County, and that it undertook to serve, in some form, the inhabitants of said town with electricity, upon terms that are reasonable and fair.

4. ———: ———: ———: **Precise Service: Shown by Acts.** Where the public service company constructed a water-power plant for generating electricity in Taney County; built a transmission line from it northerly through Newton County to Joplin; erected a sub-station a mile east of Diamond, and from thence built additional lines extending to Granby and Neosho in Newton County; put in distribution systems at Granby and at Pierce City in Lawrence County; then began the operation of its plant and the distribution and sale of electric current; at Joplin and Neosho, sold and delivered electricity at wholesale to another electric company; at Granby and Pierce City, distributed and sold the current directly to consumers, it marked out for itself the precise service undertaken within the selected territory, and the inference from these constructions and operations necessarily is that it had undertaken not only to furnish electricity to the public at wholesale, but to distribute and sell it to the inhabitants of the towns and other populous centers in the selected district, including the town of Diamond. And the inference that Diamond was a community it had professed to serve is further enforced by the fact that its agent went there to ascertain how many of its residents would use the service.
5. ———: ———: **Reasonableness.** An electrical company is not required to furnish electricity to every village and hamlet within the boundaries of its professed service, unless such requirement is reasonable; and the reasonableness of an order of the Public Service Commission requiring it to serve a certain town depends on whether it is arbitrary, capricious or unlawful. And where the facts demonstrate that the order is neither arbitrary nor capricious, it can be held to be unlawful only on the ground that it will operate to take the company's property for a public use without just compensation.
6. ———: ———: ———: **Unlawful: Just Compensation.** Where the order of the Public Service Commission requiring an electrical company to distribute and sell electricity to the inhabitants of a certain town does not appropriate such property to a public use to which the company has not already dedicated it, and the evidence shows that furnishing the service will not entail even a present financial loss, and that the gross revenue will be sufficient to cover depreciation and the cost of operation and to insure an ade-

quate return on the investment, the order cannot be held to operate to take the company's property for a private use without just compensation, but is a reasonable and lawful one.

7. ———: ———: **Choosing Towns Within Selected Territory** Where the effect of its occupying a selected territory by a public service corporation is to exclude therefrom other public service utilities and to leave unserved the communities therein it does not choose to serve, it will not be permitted to pick and choose and serve only the portion of the territory covered by its franchise which is presently profitable to it.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate*, Judge.

AFFIRMED.

A. E. Spencer for appellant.

(1) The Public Service Commission has not the power to order relator to enter and serve the new territory embraced in the settlement of Diamond, against the judgment and will of the officers and management of the relator, and where it does not render any service in the vicinity of Diamond, and such new territory is not part of some territory relator has theretofore undertaken to serve. *State ex rel v. Public Service Com.*, 270 Mo. 442, 446; *People ex rel. v. Willcox*, 200 N. Y. 431; *Atchison, T. & S. Ry. Co. v. Railway Commission*, 173 Cal. 577, 160 Pac. 828; *Towers v. United Rys. & El. Co.*, 126 Md. 478; *Public Service Com. v. Philadelphia Ry. Co.*, 122 Md. 438; *Northern Pac. Ry. Co. v. Railroad Com.*, 58 Wash. 360; *City of Scranton v. Scranton Ry. Co.*, P. U. R. 1915, C, p. 890; *In re North Lincoln Tel. Co.*, P. U. R. 1917, A, p. 609; *Frank Turnbull Co. v. Sweetwater Water Co.*, P. U. R. 1915 E, 629; 1 *Wyman on Public Service Corporations* (1911 Ed.), sec. 267, p. 237, sec. 273, p. 242, and sec. 276, p. 246. (2) Even if the transactions with George Clark in 1913 amounted to an agreement to furnish electricity to the persons with whom he dealt, these transactions could only constitute separate and individual contracts with each of such par-

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ties, and the power to enforce any such agreement would rest with the courts of this State. *Atchison, T. & S. Ry. Co., v. Railroad Commission*, 173 Cal. 577; *House Furn. Co. v. Union El. Light & Power Co.*, 2 Mo. P. S. C. 656, P. U. R. 1916, B, pp. 645-656.

R. Perry Spencer, General Counsel, and *James D. Lindsay*, Assistant Counsel, for Public Service Commission; *Grover C. James*, for Brookshire Hardware Company.

(1) The order is one authorized by the provisions of the Public Service Commission Law, is reasonable, and not violative of any constitutional or other fundamental right of the appellant. It is practicable to supply the needs of the community involved, and the obligation rests upon appellant to do so. Public Service Act, Section 16, Subdivision 5; Section 68; Section 69, Subdivisions 1 and 2; *People ex rel. New York Gas Co. v. McCall*, 219 N. Y. 84, P. U. R. 1917, A, 553, 245 U. S. 345; *People ex rel. Gas Co. v. Deehan*, 153 N. W. 528; *Railroad Co. v. Jacobson*, 179 U. S. 287; *Oregon R. & N. Co. v. Fairchild*, 234 U. S. 529.

(2) The conclusions reached by the New York Court of Appeals, and approved by the Supreme Court of the United States, upon a statute identical with, and precedent to, the Missouri statute, upon facts parallel with those found in this case, should be regarded here as authority controlling in reason and persuasiveness. The report of the decision of the New York Commission will be found in P. U. R. 1915, B. 821; and the report of the decision of Appellate Division of the Supreme Court, First Department, New York, will be found in 157 N. Y. Supp. 707, P. U. R. 1916, D, p. 91.

RAGLAND, C.—This is an appeal from the judgment of the Circuit Court of Cole County affirming an order of the Public Service Commission, requiring relator to furnish electric service to the inhabitants of Diamond, in Newton County.

Relator is a public service corporation engaged in the business of generating, distributing and selling to the public electric energy for light and power. It was incorporated under the laws of this State in 1911. The purposes for which it was formed, according to its charter, were:

“To generate, distribute and sell electric energy and supply water and water power in Missouri and elsewhere, . . . to acquire the consent of Congress to dam navigable streams, to dam other streams as provided by law, to use eminent domain as provided by law, to acquire franchises from municipalities . . . and to do any and all things and acts connected with or appertaining to or in any manner affecting the business of generating, distributing and selling electric energy and water.”

In 1912 it obtained from the County Court of Newton County a franchise authorizing it to erect and maintain poles and wires for electric light and power upon, along and across the highways of that county. It acquired similar franchises in Jasper, Lawrence, Christian, Greene and Taney counties. At the time of the making of the order of which relator complains, and for several years before that time, it owned and operated a water-power plant on the White River at Powersite, in Taney County. The electric energy generated there, it distributed and sold. Its entire plant and equipment, employed in its business of generating, distributing and selling electric energy, it valued at \$2,200,000. In 1918 it sold 37,000,000 kilowatt hours of electricity; a large part of this was sold to other public utilities, but relator itself served the cities of Granby and Pierce City. During that year and previously, relator delivered large quantities of electricity to the Empire District Electric Company at Joplin. This latter company and relator occupied in part the same field. The Empire District Electric Company was engaged in the production and sale of electricity in Jasper and Newton counties in this State and in some of the counties just across the State line in Kansas. It distributed and sold electricity in Neosho, and in practi-

cally all of the cities and villages in Jasper County. Its franchise covered both counties, Newton and Jasper. The two corporations were officered, in part at least, by the same individuals, and an agreement existed between them for an exchange of electrical current in case the supply of either should fail. The gross operating revenue of relator in 1918 was \$235,018.11; that of the Empire District Electric Company in 1917, \$1,357,264.96.

Diamond is an unincorporated town and has a population of about five hundred. The town contains twelve mercantile concerns, one bank, two mills, one elevator, two garages, three churches, a school building and one hundred residences. The population has increased thirty-five per cent within the last five years. Relator owns and operates a line of poles and wires extending from its dam at Powersite to Joplin for the transmission of electricity for distribution and sale. The line was built in 1913, and it passes along a public road through Newton County. Relator erected a sub-station on the line at a point one mile east of the business center of Diamond. At this sub-station electricity is taken from the transmission line on which it is carried at 66,000 volts and its voltage reduced for transmission on lines owned by relator to the near-by towns of Granby and Neosho.

George Clark, an employee of relator, went to Diamond in the year 1913, in behalf of relator, with a view to selling its inhabitants electricity, the same to be furnished by relator by a line to be constructed from its sub-station on the transmission line to the town. Clark canvassed the town, offering the residents electricity at the same rate as that charged at Granby, which was ten cents per kilowatt hour. Practically all of the persons he called upon agreed to take electricity. Soon afterwards he again came to Diamond, accompanied by a representative of a company engaged in selling and installing wires and electrical equipment. Clark represented that it was agreeable to relator for this company to install the wires in the houses at Diamond, and that relator would be ready to deliver electricity there when

the wiring was completed. Thereupon the owners of fifteen houses had them wired and equipped ready to receive electricity. After the wiring was completed in November, 1913, and from time to time during the ensuing period of about five years, residents of Diamond called upon relator and urged that it construct the line from its substation and give them electric service. Relator at such times promised, rather evasively, that it would build the line as soon as it could get to it. Finally, in 1918, relator announced that Diamond did not offer sufficient business to justify the preliminary expenditure that would be necessary to enable it to furnish the service, but that if the people of Diamond would build out to the substation it would sell and deliver to them there electricity at wholesale.

Relator's vice-president, B. C. Adams, testified that Clark had no authority to bind it to furnish electrical service at Diamond; that it was the established policy of his company to not even consider building into a community like Diamond, unless and until, from previously gathered information, it appeared that a profitable business could be secured; and that pursuant to its customary methods, Clark was sent to Diamond merely to ascertain how many people would use lights if the company concluded to build in and offer the service.

Mr. Adams further testified that relator, by extending its service into Diamond, would sustain an annual loss of \$712.50. He based his estimates on the assumption that fifty customers could be procured. From these customers, by charging them at the rate of ten cents a kilowatt hour, with a minimum of one dollar per month, a gross annual revenue of \$1050 would be obtained. As against this he estimated the annual operating expense for the service at \$506.50, and depreciation and return—on \$5,749.56, the cost of the additional construction required, and on \$3,920, the proportionate part of the plant investment chargeable to Diamond—at \$1,256, making a total of \$1,762.50.

In relator's estimates six per cent was allowed for depreciation and seven per cent for return on the investment. The Commission ruled that six per cent was excessive for annual depreciation; that four per cent would fully cover it. As thus modified, relator's estimates indicate that there would be an annual deficit of \$520. This amount the Commission held could be overcome by applying a rate of fifteen cents per kilowatt hour, with a monthly minimum charge of one dollar and fifty cents, instead of ten cents per kilowatt, used by relator as the basis of its calculations. Thereupon the Commission made an order requiring relator to extend its line to Diamond and to furnish electric service there, on the condition: that residents of Diamond would, within thirty days thereafter, by written agreement, obligate themselves to take electric service from relator for one year, through at least fifty different service connections, and to pay therefor at the rate of fifteen cents per kilowatt hour, with a monthly minimum of one dollar and fifty cents for each service connection. Within the designated time eighty residents of Diamond obligated themselves, conformably to the Commission's conditional order, to take electric service from relator. The order was made final December 18, 1919.

Some of the facts relating to the territory covered by the Empire District Electric Company and relator, the character and extent of the service rendered by them therein and the relation existing between the two companies, appear solely from annual reports made by them to the Public Service Commission, which were by reference incorporated in the report and finding of the Commission in this case. No objection to their consideration, on that ground, however, has been raised, and their correctness is not called in question.

Relator resists the order of the Public Service Commission on this ground: The proposed improvement and extended service involves the entry by relator into new territory and the rendering of service to a community which it does not serve and has not in

the past served, and which its management, as a matter of business judgment, has determined not to serve and, therefore, as a matter of law, the Commission is without power or authority to order relator to give such service. It concedes that the Commission has the power to direct and control its operations and the service rendered by it, as a public service corporation, in territory in which it has elected to enter and has undertaken to render service, but plants itself squarely on the proposition that Diamond is not such territory.

I. If it be true, as relator contends, that Diamond is not a part of the territory it has undertaken to serve, then unquestionably the Commission was without power to make the order under consideration. The Elected Public Service Commission Law (Sub-division 2, sec. 10478, R. S. 1919) confers upon the Territory: Commission "power to order reasonable Compulsory Service. improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of . . . electrical corporations" This power, however, must be deemed to be one within constitutional limitations. So construed, it does not give the Commission authority to compel relator to serve a territory not embraced within its profession of service. Such compulsion would be tantamount to an appropriation of relator's property to a public service to which it has not dedicated it—a taking of private property for public use without just compensation. [Atchison, T. & S. Ry. Co. v. Railroad Comm., 173 Cal. 577.] For notwithstanding relator is employing its plant and equipment in a public service, they still remain its private property, and the public may not assume the role of general manager and require such property to be used in a service to which the owner has not voluntarily dedicated it. [Interstate Commerce Comm. v. Railroad, 209 U. S. 118.]

On the other hand, if Diamond is territory comprehended within relator's profession of service, relator may be required to serve it, because it is relator's duty, within reasonable limitations, to serve all in such ter-

ritory who apply. [New York & Queens Gas Co. v. McCall, 245 U. S. 345; Lukrawka v. Water Co., 169 Cal. 318; Wisconsin Railroad Co. v. Jacobson, 179 U. S. 287; Woodhaven Gaslight Co. v. Deehan, 153 N. Y. 528.]

II. The question of relator's profession of public service is essentially one of fact and it is our province to determine that fact from the evidence that was before the Public Service Commission, unhampered either by its finding with respect thereto, or by the conclusions reached by the circuit court which reviewed it. [Sec. 10522, R. S. 1919; State ex rel. Railroad v. Pub. Service Com., 271 Mo. 155.]

It was not shown that relator had ever made any express declaration with reference to the territorial limits upon the service professed by it. But its charter, franchises and acts, in the conduct of its business, may as clearly evidence those limits as would an explicit declaration on its part. [1 Wyman on Public Service Corporations, sec. 220.] Relator's charter empowers it "to generate, distribute and sell electric energy in Missouri and elsewhere, and to do all things incident thereto." The charter in this respect is permissive merely. It does not require relator, upon demand, to distribute and sell electricity everywhere in Missouri; nor can it be reasonably inferred that by accepting such charter power it undertook to furnish service in all parts of the State. Upon receiving its charter, however, relator proceeded to localize the territory in which it proposed to operate; it applied for and received a franchise permitting it to erect poles for the suspension of electric light and power wires on, along, under, and across the public roads and highways of Newton County. It obtained pole-line rights-of-way in Jasper, Lawrence, Christian, Greene and Taney counties. It is inferable from the record as a whole that the franchises granted it by the counties last named were similar in all respects to the one given it by Newton County. In this connection it will be noted that relator did not seek permission to erect its poles and wires merely

along some of the highways in the district that it marked off as the field of its operations—it obtained franchises that covered all the public roads and highways therein, including the streets and thoroughfares of Diamond. Where an electrical corporation obtains a franchise to occupy with its wires and equipment all of the streets and alleys of a municipality, there is never any question as to the territory that it is undertaking to serve. It seems equally clear that relator in this case, by applying for and obtaining franchises covering the whole of six contiguous counties in Southwest Missouri, expressly defined the exterior limits of its profession of service, territorially considered.

What precise service relator has undertaken within the territory it marked out for itself is next to be considered. It constructed a water-power plant for generating electricity in Taney County; it built a transmission line from it northerly through Newton County to Joplin; it erected a sub-station a mile east of Diamond and from thence built additional lines, extending to Granby and to Neosho in Newton County and probably to other points; it put in distributing systems at Granby and at Pierce City in Lawrence County; and then it began the operation of its plant and the distribution and sale of electrical current. At Joplin and Neosho it sold and delivered it at wholesale to the Empire District Electric Company; at Granby and Pierce City it distributed and sold the current directly to the consumers. From these constructions and operations the inference necessarily arises that relator has undertaken not only to furnish electricity to the public at wholesale, but to distribute and sell it to the inhabitants of the towns and other populous centers in its district. Is Diamond such a community as it has professed to serve? Undoubtedly, else it would not have sent its agent there to ascertain how many of its residents would use the service.

III. Relator may not be compelled to furnish electrical service to every village and hamlet in the six

counties covered by its franchises. Nor can it be required to furnish such service to Diamond, notwithstanding it is within the boundaries of relator's professed service, unless such requirement is reasonable. This brings us to a consideration of the reasonableness of the Commission's order. The reasonableness of the order, in the sense in which we may determine it, in the exercise of judicial power, depends on whether it is, or is not, arbitrary, capricious, or unlawful. [Section 10522, R. S. 1919; State v. Great Northern Ry. Co., 130 Minn. 57; People v. McCall, 219 N. Y. 84.] That it is not arbitrary, or capricious, so fully appears from the statement of facts that a further consideration of it in that respect is unnecessary. If it is unlawful, it is because it operates to take relator's property for a public use without just compensation. As we have seen, the order does not effect an appropriation of such property to a public service to which relator has not dedicated it. An additional test remains to be applied: Does there exist a reasonable expectation that the consumption of electrical current at Diamond will be sufficient to warrant the necessary preliminary expenditure? [Pub. Service Corp. v. American Lighting Co., 67 N. J. Eq. 122, 131.] The evidence shows that the furnishing of the service will not entail even a present financial loss; that the gross revenue derivable from it will be sufficient to not only cover depreciation and the cost of operation, but to afford relator, in addition thereto, an adequate return on its investment. We hold that the order requiring relator to supply Diamond with electrical current for lighting purposes is a reasonable one.

IV. The situation in general outline, as disclosed by the evidence, seems to be this: Two public service corporations, relator and its ally, the Empire District **Picking Territory:** Electric Company, have marked off a portion of Southwest Missouri for the field of their operations; within this territory they have constructed water-power plants, enabling them to produce electrical

current at the lowest cost, and have strung along the highways their transmission lines; here and there throughout the territory they have selected such of the towns and centers of population as seemed the most attractive from the standpoint of profits; and these they are supplying with their service. The effect of their so occupying the territory is to exclude therefrom other public service corporations, with the result that the smaller communities that they do not supply must go unserved. In this connection the language of Mr. Justice CLARK in *New York & Queen's Gas Co. v. McCall*, 245 U. S. 351, is apposite:

“Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render.”

It follows from the conclusions reached that the judgment of the circuit court should be affirmed. It is so ordered. *Brown and Small, CC.*, concur.

PER CURIAM:—The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court. All of the judges concur, except *Elder, J.*, not sitting.

RALPH ADAMS, by Next Friend, v. **QUINCY, OMAHA & KANSAS CITY RAILROAD COMPANY**, and **WILLIAM G. McADOO**, Director General of Railroads, Appellants.

Division One, April 9, 1921.

1. **PARTIES: Railroad and Director General: Substitution.** Whether or not a railroad company could be sued for damages after the promulgation of Order No. 50 of the Director General of Railroads, and where suit was brought against the railroad company and William G. McAdoo whether Walker D. Hines should have been substituted as defendant, are purely academic questions in view of the Transportation Act of 1920, which authorized the substitution of the agent designated by the President in lieu of both the railroad company and the Director General.
2. ———: ———: **Substituted By Body of Petition.** Where the answer, although entitled, "Answer of William G. McAdoo, Director General of Railroads," purports in its body to be the answer of the Director General of Railroads, without naming him, "now in possession of said railroad," and the record shows that the attorney for Hines defended the case, it will be held that said Hines was substituted for McAdoo.
3. ———: ———: **Order No. 50.** After the promulgation of Order No. 50 by the Director General of Railroads on October 28, 1918, the railroad company, joined with him as defendant, was no longer subject to suit for personal injuries arising during Federal control, whether happening after or before the date of said order.
4. ———: ———: **Misjoinder.** Where the railroad company and the Director General of Railroads were joined as defendants, the erroneous judgment against the railroad company does not affect the validity of the judgment against the Director General.
5. **NEGLIGENCE: Pleading: Impossibility.** A charge in the petition that defendant's negligent act "caused a piece of metal to break off of said rail, said spike and said spike maul," does not charge an impossibility.
6. ———: **Expert: Striking Spike.** The matter of qualification of experts is largely within the discretion of the trial court, and it does not abuse its discretion in permitting a section-man, who has had eighteen months' experience as a trackman, to testify that the prop-

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er way to drive a spike is for the driver to be on the same side of the rail as the spike. Furthermore, where the witness corroborated the testimony of the two other conceded experts, his testimony at worst was harmless error.

7. **INSTRUCTION: Supported by Evidence: Proximate Cause.** The circumstantial evidence showed a small moon-shaped nick in the rail, and three or four nicks in the iron maul, after the injury; that plaintiff heard a ringing sound, as if the maul had struck the rail, when the fellow-servant struck at the spike; that the spike was against the rail when it was struck; that concurrently with the blow some substance, hard and sharp, cut a gash in plaintiff's eye, so that the fluid therefrom immediately escaped into the plaintiff's hand. *Held*, that there was evidence that a piece of steel broke off of the spike, the rail or the maul, as charged in the petition, and such evidence was sufficient to support an instruction, submitting that issue to the jury.
8. ———: ———: **Negligence: Driving Spike.** And evidence that the proper way to drive a spike was for the "nipper" to put an iron bar under the tie and pry the tie up tight against the rail before any attempt to drive the spike was made, and for the driver and spike to be on the same side of the rail, and that he stood on the opposite side and struck the spike with the iron maul before the "nipper" had attempted to pry up the tie, is abundant evidence of the driver's negligence in driving the spike.
9. **NEGLIGENCE: Assumption of Risk.** Under the Federal Employers' Liability Act assumption of risk is a defense, which, to be available, must be pleaded by defendant.
10. ———: ———: **Instruction: Established Method.** Where the instruction simply says that plaintiff did not assume the risk of any dangerous method of work employed by the driver of spikes in using his maul, unless plaintiff knew or could have known thereof by due care prior to his injury, a criticism that there is no evidence that defendants were negligent in establishing the method of doing the work lacks substance.
11. ———: ———: ———: ———: **Extraordinary Vigilance.** An instruction telling the jury that it was not the duty of the plaintiff "to maintain extraordinary vigilance to discover defects and dangers in the method of doing the work," where the work referred to is the work which defendants did through their servant at the time of plaintiff's injury, and not their method of doing such work generally, is not erroneous. Under no circumstances was plaintiff required to exercise more than ordinary care to anticipate said servant's negligent act in doing the work.

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12. **ARGUMENT TO JURY: Discharge.** Remarks of counsel in their argument to the jury are not reversible error unless the rulings of the court thereon are excepted to at the time they are made, and unless such exceptions are saved the court does not err in refusing to discharge the jury.
13. **EXCESSIVE VERDICT: \$20,000.** Where the injury to a youth eighteen years of age consisted of the loss of one eye, and there is a lurking chance of the impairment of his other eye by reason of the injury sustained, a verdict of \$20,000 is too large by \$7,500.

Appeal from Grundy Circuit Court.—*Hon. L. B. Woods,*
Judge.

REVERSED AND REMANDED.

Hall & Hall and *J. G. Trimble* for appellants.

(1) All the errors assigned affecting the defendant railroad company may be summed into one, the judgment must be reversed as to that defendant because this court will take judicial notice of the proclamations of the President and orders of the Director General as well as the Federal Control Act and the Transportation Act. These show the defendant railroad company was not operating the road at the time of the injury to plaintiff October 28, 1918, and, therefore, no judgment can be entered against it. *Nor. Pac. Ry. Co. v. State*, 250 U. S. 148. *Kersten v. Hines*, 223 S. W. 592. *Cravens v. Hines*, 218 S. W. 912. The practice seems to be to reverse the judgment as to the defendant railroad company and deal with the judgment against the Director General of Railroads as if he had been the only party to the action from the beginning. That course would not be proper in this case, as we think the allegations show the Director General is made a party at his own order (not because interested), that "defendants" jointly owned and operated the road and that plaintiff was a joint employee having been made solely to prejudice the jury, defendant Hines is entitled to a reversal of the judgment, regardless of any other errors in the case. (2) The court committed error in refusing to

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sustain the objection to the introduction of any evidence and in refusing to sustain defendant Hines' motion in arrest. (a) The third paragraph of plaintiff's petition (p. 2) shows that the Director General was made a party defendant "at his own order" and not because plaintiff desired a judgment against him. The further allegations of the petition use the plural "defendants" in charging ownership and operation of the railroad and employment of the plaintiff. The court should have taken judicial notice of the fact the government was not in partnership with the railroad company in the ownership and operation of the road. As a general rule misjoinder of parties defendant is not cause for reversing the judgment as to all defendants, if there be one who is singly liable. In this case the general practice should not be followed. (b) The petition alleges that the negligent acts of James and the defendants "caused a piece of metal to break off of said rail, said spike, and said spike-maul." In this allegation there is a charge of joint negligence on the part of James and the joint defendants and that that negligence caused a piece of metal to break off of three different things—an impossibility. There is no charge of a specific defect, and, therefore, no cause of action is stated against either defendant or both of them jointly. The objection to the introduction of any testimony should have been sustained. Failing in that the court should have sustained motion in arrest of judgment because the petition does not state facts sufficient to constitute a cause of action against Hines jointly or singly. (3) The court erred in permitting plaintiff and the witness Barlow to testify as experts. (4) Instruction No. 1 given on behalf of the plaintiff is erroneous. There is no causal connection shown between the position James was in when he undertook to comply with plaintiff's request and the accident. Instructions should be within the pleadings and also within the evidence. It is error to give an instruction on a theory not made in the petition or on one which there is no evidence to sup-

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port. *Hufft v. Railroad*, 222 Mo. 286; *Degonia v. Railroad*, 224 Mo. 564; *Moellman v. Lumber Co.*, 134 Mo. App. 485. There was no evidence in this case upon which to submit to the jury the question that deceased had not been guilty of contributory negligence; so that the instruction so submitting that question was not only beyond the purview of the proven facts but was confusing and misleading." (5) Instruction No. 2 is erroneous. (a) It singles out the railroad company as being the only defendant who might raise the question of assumption of risk. (b) It was not authorized under the evidence. It tells the jury that the plaintiff could not be held to have assumed the risk of defects and dangers in the "method of doing the work" and the method in which James used the spike-maul, when there was no evidence whatever that there was any negligence on the part of the defendant in establishing the method of doing the work. It also instructed the jury that the plaintiff did not have to use extraordinary vigilance to discover defects and dangers in the method of doing the work, but "had a right to believe that the defendants were doing their duty with reference to the method of doing the work" when he had no knowledge to the contrary. There was no evidence whatever to indicate that the defendant was guilty of any negligence in regard to the method of doing the work. (6) The verdict is so excessive as to permit only one conclusion and that is that it is the result of prejudice and passion.

A *remittitur* will not cure the wrong done. *Neff v. City of Cameron*, 213 Mo. 350; *Wellman v. St. Ry.*, 219 Mo. 126; *Sexton v. Railroad*, 245 Mo. 254; *Johnson v. Brick Co.*, 205 S. W. 615; *Brady v. Railway*, 206 Mo. 509.

Platt Hubbell and *Geo. H. Hubbell* for respondent.

(1) Judgment should be affirmed against the legally substituted defendant. *Kersten v. Hines*, 223 S. W. 586; Section 206 (a) Transportation Act, 1920. The Missouri statute is liberal on the subject of amendments at any stage of the proceedings. R. S. 1909, sec. 1851.

At the time this case was tried, there was high authority for joining the railroad company as a party defendant. 88 Cent. L. J. 160; Mo. Pac. R. Co. v. Ault, 216 S. W. 3; Ft. Worth Ry. Co. v. Thompson, 222 S. W. 289. The joinder of an unnecessary party as a defendant is no ground for reversal. Halasy v. Halasy, 256 Mo. 327, 330. There is nothing in this record to take this case out of the general rule already announced in Kersten v. Hines, 223 S. W. 586. There is no allegation that defendants jointly owned anything. "Jointly" does not appear in the petition. (2) Plaintiff wanted and secured a judgment against the Director General of Railroads. There is no allegation of partnership. The phrase "at his own order" is merely for the purpose of showing the capacity in which the Director General is sued—and recognizes orders made by him. Plaintiff's petition does not charge an impossibility. Plaintiff had a right to charge that a piece of metal broke off of three different objects—and proof that a piece of metal broke off of one or two objects, is within the allegations of the petition. And, from such a blow as was struck by James, it was highly possible that a piece of metal might have broken off of three different objects. (3) The cross-examination of Fred Barlow proves sufficient experience to qualify him to give expert testimony, as to the proper method of driving such a spike. No rule of evidence was violated in any of the expert evidence. Meily v. Ry. Co., 215 Mo. 567; Same case, 114 S. W. 1013; Wilder v. Great Cereal Co., 109 N. W. 791, 134 Iowa, 451; Combs v. Construction Co., 205 Mo. 391. (4) Plaintiff had a right to testify to where he expected James to stand while striking the spike. Pringle v. Ry. Co., 21 N. W. 108, 64 Iowa, 613. (5) All the facts hypothesized in plaintiff's first instruction, are proved by the evidence. All the facts hypothesized in plaintiff's first instruction are alleged in the petition. To authorize a recovery by the plaintiff, all the facts alleged need not be proved. 4 A. L. R. 979. (6) Proximate cause of an injury of death may

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be proved by circumstantial evidence. *Colorado & So. Ry. v. Rowe*, 224 S. W. 932; *San Pedro, L. A. & S. L. R. Co. v. Brown*, 258 Fed. 806. (7) James was negligent in striking with his spike-maul while standing on the north side of the rail, and before the nipper had applied his bar and put his weight onto the bar. *Siegemund v. Chicago, M. & St. P. Ry. Co.*, 229 Fed. 956; *Hutson v. Mo. Pac. Ry. Co.*, 50 Mo. App. 300; *Swain v. Railway Co.*, 174 N. W. 386; *Oestreich v. Railway Co.*, 167 N. W. 1032. "Railroad Company" is a generic and group name applicable to those against whom the plaintiff is prosecuting his case—as shown by the context of this instruction. Plaintiff's second instruction complies with the most technical rulings of the Supreme Court of the United States on the subject of assumption of risk. *Pryor v. Williams*, 41 Sup. Ct. 36; *Texas & P. R. Co. v. Swearingen*, 49 L. Ed. 388, 196 U. S. 51; *Chicago & E. R. Co. v. Ponn*, 191 Fed. 682; *Williams v. Bunker Hill, etc., Co.*, 200 Fed. 211; *Fidelity Trust Co. v. Wisconsin I. & W. W.*, 129 N. W. 615; *Dolese Bros. Co. v. Kahl*, 203 Fed. 627; *C. R. I. & P. Ry. Co. v. De Vore*, 143 Pac. 864; 43 Okla. 534; 17 Corp. Jur. 1116; *Bower v. V. & N. W. R. Co.* 148 N. W. 145, 96 Neb. 419.

SMALL, C.—Appeal from the Circuit Court of Grundy County. Suit for personal injuries. The railroad company and William G. McAdoo, Director General of Railroads, were defendants when the petition was filed November 19, 1918.

The petition alleged that on October 28, 1918, plaintiff was in the employ of defendants as a common laborer with a section-crew engaged in repairing the tracks of defendants at Knox City, Missouri. That he, on that date, lost his left eye, because one James, a fellow-servant working with him, attempted to drive a spike into a tie and "negligently struck at said spike and negligently struck said spike and rail with said maul," and "thereby caused a piece of metal to break off of said rail, said

spike and said spike-maul, and to fly up, strike the left eye of plaintiff, and entirely put out the sight thereof, and said injury to said left eye . . . has also resulted in a serious injury to the plaintiff's right eye and the sight thereof." The petition also alleged that said spike was weak and crooked, and not reasonably fit for said work, and said spike-maul was slivered, split, broken and battered, and not reasonably safe for doing said work.

At the January term, 1919, defendant railroad company filed a motion to dismiss, because at the time the injury was alleged to have occurred, to-wit, October 28, 1918, its railroad was and for sometime previously had been in possession of and operated by the United States Government by defendant, McAdoo, as Director General of Railroads, under the Act of Congress approved August 29, 1916; that plaintiff and his co-employees were not servants of defendant railroad company, at the time of his injury, but of said Director General, and that by virtue of an order made and published by said Director General, on October 28, 1918, all suits sought to be prosecuted upon causes of action accruing while he was in possession and control of said railroad, should be prosecuted solely against him as such Director General, and in no other manner, and by no other name; that, inasmuch as said Director General had been made a party to said suit, the cause should be dismissed as to defendant railroad company.

On the hearing of this motion to dismiss, it was shown by evidence of defendant railroad company that said William G. McAdoo had resigned as Director General of Railroads, and Walker D. Hines was appointed his successor on January 10, 1919, and said Hines had issued an order saying that in all actions pending it should be unnecessary to use his name, but it should be sufficient if the name of defendant should be, "The Director General of Railroads." Said motion was overruled January 27, 1919.

On February 14, 1919, an answer entitled, "Answer of William G. McAdoo, Director General of Railroads,"

was filed in said cause, but the record entry of such filing simply showed the filing of "Separate Answer of the Director General of Railroads."

Furthermore, defendants' attorney testified, on the hearing of said motion, that he represented Walker D. Hines, Director General of Railroads. Said answer, while entitled, as aforesaid, purports to be the answer of the Director General of Railroads, without naming him, "now in possession of said railroad," as well as in possession thereof when plaintiff alleges he was injured.

In the title of the case on the record of the entry of the verdict and judgment, the railroad company and Walker D. Hines, Director General, are named as defendants, and the name of William G. McAdoo is omitted.

On said February 14, 1919, defendant railroad company also filed its answer. Both the answer of the Director General of Railroads and the railroad company set up that at the time complained of by plaintiff the said Director General, and not the railroad company, was in possession of and operating the railroad of the defendant company, and that employees, officers and agents operating said railroad were the servants, and their acts were the acts, of the United States Government and said Director General. Both answers also put the allegations of the petition in issue.

As to the evidence. Plaintiff testified, in substance: That he was eighteen years old at the time of his injury. Had been through the first year in high school. Was six feet tall, and weighed 196 pounds before his left eye was put out; since then, 180. His eye was destroyed while at work as a section-hand on the railroad of the defendants on October 28, 1918. He had worked about a week before that time. He was working to save money to take a business course in school. He never worked for a railroad previously, except for a week in the spring prior to the accident. The wage he received from defendants was \$3.75 per day. He and other members of the section crew on the morning of October 28, 1918, had been repairing the main track west of the depot at Knox

City, Missouri, putting spikes in some new ties, and about eleven o'clock were directed by the foreman to go over to the sidetrack north of the depot and spike the new ties which had been put in there. That he went over to said sidetrack with three other section-men, Collier, James and Westfall. That James and Collier started to drive two spikes in a tie, one spike on each side of the north rail, James driving the one on the north, and Collier the one of the south side of said rail. That James drove his spike in without difficulty, but Collier's spike bent over and got under the ball of the rail. Collier leaving the spike in this condition to answer a call of nature, plaintiff took his place on the south side of said rail, and undertook to straighten up the spike, and asked James to drive it in, because James was right-handed and the plaintiff was left-handed, and the spike was leaning towards the east and was against the rail, and a right-handed man could drive it in more conveniently than a left-handed man, provided he was on the south side of the rail, where plaintiff expected James would place himself to drive the spike; but that James, without going to the south side of the rail, and without warning plaintiff that he was going to strike it, struck the spike from where he was standing on the north side of the rail. At the moment James struck, plaintiff was just straightening himself up, and something hit him in the left eye, and, at the same time, plaintiff also heard a ringing sound, as if James also hit the rail with the iron maul he used in driving the spike. Plaintiff threw his hand up to his face and his left eye "run out into his hand." Plaintiff suffered considerable pain at the time, and for some time thereafter, and at the time of the trial had pains in his head back of his right eye. He also suffered some inconvenience in seeing and reaching for things on his blind side. Plaintiff further said that about a week after he was hurt he returned from the hospital and examined the rail at the place where the accident occurred, and a small moon-shaped piece had been chipped out of the rail. He also afterwards saw the iron maul James used, and

it had three or four small nicks on the side of the large end of it. His parents had given him the right to keep all the wages he should earn.

Plaintiff's medical testimony showed that the sight of his left eye was destroyed, and it was shrunken and shriveled. It was inflamed for some time after the accident, but had no settled inflammation in it at the time of the trial, although it was somewhat inflamed then, which might, however, have been from catching cold in it. The substance which struck it had never been removed from plaintiff's eye. If it was still in there it might months or years afterwards set up inflammation that might cause the right eye to become inflamed, in which event it might become necessary to enucleate the left eye in order to save the right eye.

W. O. Westfall testified for plaintiff: That he was the "nipper," and it was his business to put an iron bar under the tie and pry the tie up tight against the rail before they attempted to drive the spike, in order to make it solid, so that the spike would drive better. That, on this occasion, James struck the spike before he had the tie pried up tight, and before he was ready for the spike to be struck. That this was the first time he had ever seen them strike a spike before he had the tie pried up against the rail.

Two experts of twenty-five or thirty years' experience as section-men and track-foremen, testified for plaintiff, without objection, that the proper way to drive a spike was for the man to be on the same side of the rail as the spike, because, if he undertook to drive it while standing on the opposite side of the rail, he would be more likely to chip the rail and hurt somebody, than to hit the spike; also, that the spike never should be struck until the "nipper" had the tie up against the rail; that is what the "nipper is there for."

Fred Barlow, of eighteen months' experience as a section-man, over defendant's objection that he was not sufficiently qualified, testified to the same effect as the other two experts.

Collier, whose place plaintiff took in trying to straighten up the spike, corroborated the plaintiff as to what took place before Collier left the scene, but he had not returned prior to the accident and did not see it.

Plaintiff's mother, Rosa Adams, testified that plaintiff was always studious and industrious and a great reader before the accident, but since then he could not read long at a time.

Plaintiff also read in evidence, Section 5968, Revised Statutes 1879, showing plaintiff's expectancy of life was 42 years.

It was admitted by defendants that the track being repaired where the injury happened was used in interstate traffic.

Defendants introduced no evidence, except Order No. 4 and Order No. 50, the latter dated October 28, 1918, of the Director General of Railroads, with the understanding that either party could read any part thereof in evidence.

The court gave a number of instructions for the plaintiff. The court refused instructions asked by the defendants to the effect that the plaintiff could not recover against both defendants, or the defendant railroad company. And the record further recites as follows: "And the defendant, Walker D. Hines, Director General of Railroads, prayed the court to instruct the jury as follows: '3. Under the pleadings and all the evidence in the case, plaintiff is not entitled to recover against the defendant, Walker D. Hines, Director General of Railroads, and your verdict will be for said defendant.' Which said instruction, the court refused to give to the jury, and to the action of the court in refusing to give said instruction, the defendant, Walker D. Hines, Director General of Railroads, saved his exceptions at the time."

During the argument of plaintiff's counsel, defendants' counsel objected to certain portions thereof, which objections the court sustained, and on request of defendants' counsel instructed the jury to disregard, and which

remarks thereupon plaintiff's counsel withdrew. Objections were also made to other statements of plaintiff's counsel in his argument, and each time the objection was sustained by the court, and the jury instructed to disregard the statement, and plaintiff's counsel admonished to stay inside of the record. No exception was saved at the time, but after the argument of plaintiff's counsel had been concluded, defendants' counsel moved the court to discharge the jury on account of the remarks of counsel to which he had objected, because they tended to prejudice the jury, "and it is well known the instructions of the court to disregard has no effect upon a jury under such circumstances." Motion was overruled, to which defendants excepted.

The jury found a verdict for the plaintiff for \$20,000, and judgment was rendered that plaintiff recover that sum against the "United States Railroad Administration and of and from all interest and rights of the Quincy, Omaha & Kansas City Railroad Company in and to money, funds or property, real, personal or mixed, which has been received or is yet to be received from the Government of the United States or the Railroad Administration thereof." There was also judgment for said sum against the defendant railroad company.

Each of the defendants, Walker D. Hines, Director General, and defendant railroad company, filed separate motions for new trial and separate motions in arrest, which were overruled. An appeal was taken by both defendants to this court.

I. A question has been raised as to the proper parties defendant herein. The appellants contend that the railroad company could not be sued, because Order No. 50 of the Director General of Railroads, promulgated October 28, 1918, prohibited all suits against railroads, and required them to be brought against said Director General, for all injuries to persons arising while such railroads were under Federal control, whether such injuries occurred prior or subsequent to the date of said Order No. 50. Appellants also contend that this suit was

brought against William G. McAdoo, Director General of Railroads, and that Walker D. Hines, Director General, should have been, but was not, properly substituted as defendant for said William G. McAdoo.

We regard both questions as academic since the passage by Congress of the Transportation Act of 1920, providing for the termination of Federal control and for the settlement of disputes between carriers and their employees. By Section 206 of said act it is provided: (a) Actions at law . . . based upon causes of action arising out of the possession, use or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act or of the Act of August 29, 1916) of such character, as prior to the Federal control could have been brought against such carrier, may after the termination of Federal control, be brought against an agent designated by the President for such purpose." Paragraph (d) of said section provided: "Actions, suits . . . of the character above described pending at the termination of Federal control, shall not abate, . . . but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a)." Paragraph (e) of said section provided: "Final judgment . . . of the character above described, rendered against the agent designated by the President under subdivision (a), shall be promptly paid out of the revolving fund created by Section 210." Paragraph (g) of said section provided: "No execution or process, other than on a judgment recovered by the United States against the carrier, shall be levied upon the property of any carrier where the cause of action, on account of which the judgment was obtained, grew out of the possession, use, control or operation of any railroad or system of transportation by the President under Federal control."

We hold that under said Transportation Act, 1920, it is proper to substitute, John Barton Payne, the agent designated by the President under said Section 206, paragraph (a), as defendant in this case, in lieu and in place

of both the railroad company and the former Director General of Railroads. The said act of 1920 contemplates that such agent shall be so substituted, without reference to whether the suits of the character designated, of which the suit before us is one, were pending against the railroad company, or the former Director General of Railroads, or both.

The plaintiff, respondent in this case, in his brief "here and now respectfully moves the Supreme Court to make a proper order of substitution . . . as has been repeatedly done." such substitution was made by this court in *Kersten v. Hines*, 283 Mo. 623, and is not without precedent elsewhere. In *Gundlach v. Railroad*, 179 N. W. 985, said John Barton Payne, as such agent, was substituted, as sole defendant, instead of the railroad company and the Federal Director General, after affirming a judgment against both of them by amending the mandate. This substitution was made on motion of the defendants in that case. But, we hold that such substitution can be made on motion of either or any party to a suit of the character designated in said Transportation Act. Consequently, "John Barton Payne, agent designated by the President, under the Transportation Act of 1920," is hereby substituted for the appellants, defendants below, as sole defendant and appellant in this cause.

II. But, if we are in error in assuming that the question of parties defendant is now immaterial and academic as to both sides of this controversy, then we hold: 1st. That Walker D. Hines was properly, if not expressly then by implication, by the body of **Substitution.** the answer and by actually defending the case below, as the record shows he did, substituted as defendant, for William G. McAdoo, Director General. 2nd. That after Order No. 50 was promulgated on October 28, 1918, by the Director General of Railroads, the railroad company itself was no longer subject to suit for personal injuries arising during Federal control of its railroad, whether such injury happened after or before the date of said Order No. 50. This question was so fully, yet con-

cisely, considered by the Federal Court of Appeals of this circuit, in *Mardis v. Hines*, 267 Fed. 171, opinion by Hook, J., that we content ourselves with referring to the opinion in that case as expressive of our views. Our Springfield Court of Appeals, in *Cravens v. Hines*, 218 S. W. 912, came to the same conclusion. The acts of Congress, proclamations of the President and orders of the Director General of Railroads are quite fully set out in our opinion in the case of *Kersten v. Hines*, 283 Mo. 623. But said Order No. 50, especially so far as it relates to injuries occurring prior to its date, has been held void in the following cases: *Franke v. Railroad*, 173 N. W. (Wis.) 701, three judges dissenting; *McGregor v. Railway*, 172 N. W. (N. Dak.) 841, one judge dissenting; *Parkinson v. Railroad*, 178 N. W. (S. Dak.) 293; *Mobile Railroad v. Jobe*, 84 So. (Miss.) 910; *Lavalle v. Railroad*, 172 N. W. (Minn.) 918.

We cannot concur in the reasoning of the opinions in these cases; we believe they take too narrow a view of the powers of the President and Director General of Railroads under said acts of Congress.

III. But, even if the judgment below was erroneous as to the defendant railroad company, it does not follow that it was invalid against the Director General of Railroads. The mere misjoinder of the railroad company as defendant does not call for a reversal as to said Director General. [*Kersten v. Hines*, 283 Mo. 623; *Cravens v. Hines*, 218 S. W. 912.]

IV. (a) The contention of a learned counsel of appellants that the petition fails to state a cause of action, because it charges that defendants' negligent act **Pleading.** "caused a piece of metal to break off of said rail, said spike, and spike maul," which is "an impossibility," is not substantial. We see no reason why such charge is an impossibility.

(b) Likewise, the contention that there is no charge of a specific "defect" in the petition. There is a charge of specific defects in the maul and spike, and negligence

on the part of a fellow-servant in striking the spike and chipping the rail, maul and spike. The petition was abundantly sufficient in this respect and in all respects to state a cause of action.

There was, therefore, no error in overruling defendants' objection to the introduction of testimony under the petition.

V. (a) There was no error in permitting the witness Barlow to testify as an expert. He had had eighteen months' experience as a track-man. The matter of the qualification of experts is largely within the discretion of the trial court. It did not abuse its discretion in this case. Furthermore, Barlow simply corroborated plaintiff's other two experts, each of whom had from twenty-five to thirty years' experience in such work. Therefore, if no error had been committed in permitting Barlow to testify as an expert, it would have been regarded as harmless error.

(b) No testimony of plaintiff, as an expert, is pointed out in the brief, and we must, therefore, disallow appellants' contention that he was not qualified to testify as an expert.

VI. (a) Plaintiff's Instruction No. 1 is objected to, because there is no evidence that a piece of steel broke off of either the spike, the rail, or the maul, as charged in the petition. The evidence does not sustain this contention. The circumstantial evidence showing the small moon-shaped nick in the rail, and three or four nicks in the iron maul, after the injury, and that plaintiff heard a ringing sound, as if the maul had struck the rail, when James struck at the spike; the fact that the spike was against the rail when James struck at it; that concurrently with the blow struck by James, some substance hard and sharp enough to cut a gash in plaintiff's eye, so that the fluid therein escaped therefrom at once into his open hand—all point to but one cause of this catastrophe and that is, that a piece of the rail or the maul or both flew off when James

**Evidence
of Cause.**

struck at the spike, and entered the eye of the plaintiff and destroyed it.

(b) So, there is abundant evidence that James was negligent in striking the spike, in the position it was in, from the position he was in and before the "nipper" had performed his function of prying the tie up firmly against the rail.

**Evidence
of Negligence.**

(c) The said Instruction No. 1 followed the allegations of the petition as to the cause of the injury, and there was abundant evidence to support it. We do not set out said instruction, because it is quite lengthy, and the only specific objections made to it are ruled against appellants in what we have said in the immediately preceding paragraphs (a) and (b).

VII. Instruction No. 2 given for plaintiff is objected to. Said instruction is as follows:

"2. On the issue of 'assumption of risk' the court instructs the jury that the plaintiff Ralph Adams cannot be held to have assumed the risk of defects and dangers, if any, in the method of work and the method in which William James used his spike-maul, unless the jury believe from the evidence, that, prior to his injury mentioned in evidence, the plaintiff had knowledge of such defects and dangers, if any—or that such defects and dangers, if any, were plainly observable by him; and unless the said Ralph Adams did have such knowledge, or, unless such defects and dangers if any, were plainly observable to him as aforesaid then, the jury would not be warranted in finding for the defendant railroad company on the defense of assumption of risk.

**Assumption
of Risk.**

"The court instructs the jury that 'assumption of risk' is an affirmative defense and the burden of proving the same is on the defendant railroad company—all the evidence in the case to be considered.

"In this connection, the court instructs the jury that it was not the duty of Ralph Adams to maintain extraordinary vigilance to discover defects and dangers in

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the method of doing the work, and that he had a right to believe that the defendants were doing their duty with reference to the method of doing the work, unless the jury believe from the evidence that he had knowledge to the contrary; and the question whether the plaintiff Ralph Adams knew of the defects and dangers, if any, above mentioned, is a question of fact for the jury to determine from a consideration of all the facts and circumstances in evidence."

(a) The appellants' objection to this instruction is that it singles out the railroad company as the only defendant who could raise the question of assumption of risk. Assumption of risk was a matter of defense to be invoked by defendants. Neither the Director General nor the railroad company asked any instructions invoking it. Furthermore while this suit is based upon the Federal Liability Act and upon an injury received while plaintiff was working as a servant upon an instrumentality used in interstate commerce, and assumption of risk is a defense, it must, in order to be available as a defense, be pleaded by the defendants, which was not done in this case.

(b) Appellants' learned counsel also contend that said instruction is erroneous, because there is no evidence that defendants were negligent in establishing the method of doing the work. This objection lacks in substance, because said instruction is not predicated on negligence in establishing the method of doing such work, but simply says, that plaintiff did not assume the risk of any dangerous method of work by James in using his maul, unless plaintiff knew or could have known thereof by due care prior to his injury.

(c) Nor is said instruction open to the objection that it was wrong in declaring that plaintiff was not in duty bound to maintain extraordinary vigilance to discover defects and dangers in the method of doing the work. The work here referred to is the work which defendants did through their agent and servant, James, at the time of plaintiff's injury, and not to their method

of doing such work generally. The instruction must be read in view of the testimony which shows, not that defendants failed to establish a proper method of doing such work generally, but that said James negligently failed to do the work, when injured plaintiff, in the usual and customary method established by defendants and other railroads generally for doing such work. Besides, under no circumstances was plaintiff bound to use more than ordinary care.

VIII. The motion of defendants' learned counsel to discharge the jury at the close of the argument, was properly overruled. "Remarks of counsel" are not reversible error unless the rulings of the court thereon are excepted to at the time they are made, which defendants failed to do. [Kersten v. Hines, 283 Mo. 623.]

IX. As to the excessiveness of the verdict. We fully realize the great loss plaintiff has sustained by the destruction of his left eye and the lurking chance of the impairment of his right eye by reason of the injury he sustained. We also have fully considered the youth of plaintiff and his expectancy of life, his disfigurement, and the handicap put upon his prospects in life by his injury. No sum of money could restore his lost eye. But the rulings of this court, in such cases, admonish us that in this case the verdict is excessive under all the facts and circumstances in evidence.

If, therefore, the plaintiff will file, within ten days from the date of the filing of this opinion, in the office of the clerk of this court, a remittitur of \$7,500, the judgment below will be affirmed for \$12,500, with interest at six per cent per annum from the date of its original rendition in the circuit court. As to John Barton Payne, agent.

The result is, that the judgment below is reversed as to defendant railroad company, and is affirmed as to and against "John Barton Payne, agent, designated by the President under the Transportation Act of 1920,"

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and substituted as sole defendant and appellant in this case, for the sum of twelve thousand five hundred dollars (\$12,500), with interest, as aforesaid, provided plaintiff files a *remittitur*, as above required. Otherwise, said judgment will be reversed as to said John Barton Payne, agent, as aforesaid, and the cause remanded for another trial. Let it be so recorded. *Brown and Ragland, CC.*, concur.

PER CURIAM:—The foregoing opinion by SMALL, C., is adopted as the opinion of the court. All of the judges concur.

MOLLIE M. LAFFERTY v. KANSAS CITY CASUALTY COMPANY, Appellant.

Division One, April 9, 1921.

1. **ACCIDENT INSURANCE: Prima-Facie Case.** In an action on an accident policy the plaintiff makes out a prima-facie case by introducing the policy and proving the death of the insured, from external bodily injuries accidentally received, within the time covered by the policy.
2. ———: ———: **Delivery: Presumption: Directed Verdict: New Trial.** The possession of the policy by the insured raises the presumption that it had been delivered and paid for, or that credit had been given for the premium; and plaintiff having made out a prima-facie case by introducing the policy in evidence and proving the insured's death, by external bodily injuries accidentally received, within the time covered by the policy, it is error to direct a verdict for defendant, however strong and convincing may be the evidence introduced by defendant to show that the policy had not been delivered or the premium paid before the death of the insured. The fact of non-delivery, where the policy was in the possession of the insured, is an affirmative defense, and the weight of the evidence to sustain it is a matter for the jury, which the court cannot lawfully usurp.

Held, by GRAVES, J., concurring, that the presumption of a delivery arises upon the showing that the policy was in possession of the deceased, and such is a rebuttable presumption, but the

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credibility of facts sufficient in the mind of the court to destroy the presumption is for the jury to determine, and hence where the court, in the presence of such facts, has directed a verdict for the defendant, a motion for a new trial should be sustained. But the trial court has authority to grant a new trial on the ground that the verdict is against the weight of the evidence, and where there is no directed verdict and the jury, in the face of facts which destroy plaintiff's prima-facie case, return a verdict for plaintiff, the court should set it aside.

3. ———: **Testimony of Agent.** The testimony of the agent of the company at the time the policy was issued, tending to show that it was not really delivered to the insured and was not paid for, is competent, although the insured is dead. [Following *Wagner v. Binder*, 187 S. W. 1128, and *Allen v. Jessup*, 192 S. W. 720.]
4. ———: **Payment of Premium by Volunteer: Hearsay.** Testimony of persons in whose employ the insured was or with whom he was connected in business, showing that at the time they paid the premium on the policy they knew or had been informed that the insured had been killed in a distant town, is not hearsay, but is binding on the plaintiff for the reason that their act in paying the premium, though made of their own motion and voluntarily, was her act, where she seeks to avail herself of the benefit of said act.

Appeal from Louisiana Court of Common Pleas.—*Hon. Edgar B. Woolfolk*, Judge.

AFFIRMED.

McCune, Caldwell & Downing and *H. M. Noble* for appellant.

(1) No contract of insurance was ever consummated. The application clearly provided when and under what conditions the insurance was to take effect. The policy was never accepted by the applicant, nor were the conditions precedent performed. (a) Lafferty never accepted the policy sued upon. As he never became liable for any premium, there is correlatively no liability on the part of the defendant. *Kilcullen v. Met. Life Ins. Co.*, 108 Mo. App. 61; *Piedmont Life Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610. (b) The premium was not paid while Lafferty was in good health and free

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from injury and therefore by his own agreement the insurance applied for never became in force. 1 Joyce on The Law of Insurance, p. 315; Kilcullen v. Met Life. Ins. Co., 108 Mo. App. 61; Piedmont Life Ins. Co. v. Ewing, 92 U. S. 377, 23 L. Ed. 610; Stephens v. Met. Life Ins. Co., 190 Mo. App. 673; Cravens v. New York Life Ins. Co., 148 Mo. 583; Whiting v. Life Ins. Co., 129 Mass. 240; Gordon v. Prudential Ins. Co., 231 Pa. 404. (c) The policy was never delivered so no contract of insurance was ever made. Wood v. Mutual Life Ins. Co., 32 N. Y. 619; 1 Joyce on Law of Insurance, p. 265; Equitable Life Assur. Co. v. Mueller, 99 Ill. App. 460; Misselhorn v. Mutual Reserve Life Assn., 30 Mo. App. 589; 1 Cooley's Brief on Law of Insurance, p. 448; Kilcullen v. Life Ins. Co., 108 Mo. App. 69; Poplin v. Brown, 205 S. W. 411; Gordon v. Life Ins. Co., 231 Pa. 404; Markey v. Ins. Co., 103 Mass. 78; Rey v. Life Assur. Society, 44 N. Y. S. 745. (2) The deposition of Joseph Burton was admissible in evidence. 4 Jones on Evid. sec. 775, pp. 645-6; Clark v. Thias, 173 Mo. 628; Wagner v. Binder, 187 S. W. 1128.

Pearson & Pearson for respondent.

(1) One of the grounds on which the court sustained the motion for new trial was, that the verdict was against the weight of the evidence; and, this is not a ground upon which the appellate court may interfere. Miners & Merchants Bk. v. Rogers, 123 Mo. App. 569; Fink v. McCue, 123 Mo. App. 316; Karnis v. Winn, 126 Mo. App. 712; Jones v. Oliver, 129 Mo. App. 86; Crow v. Crow, 124 Mo. App. 125; Clarkson v. Garvey, 179 Mo. App. 18; Cornell v. Ins. Co., 179 Mo. App. 426; Jiner v. Jiner, 182 Mo. App. 158. That the "verdict is against the evidence," or, "should have been against the plaintiff instead of defendant," are grounds for a new trial, substantially the same as saying that the verdict is against the weight of the evidence. State ex rel. v. Todd, 92 Mo. App. 1; Bird v. Vanderburg, 168 Mo. App. 118; Raifiscen v. Young, 183 Mo. App. 511; Watts v. Pier-

son, 170 Mo. App. 532. (2) There was abundant evidence in this case to carry it to the jury. The possession of the insurance policy by the insured, and the sending out by the home office, of the "Official Receipt Card" and "Identification Card" are sufficient evidence of a delivery of the policy to carry the question of delivery to the jury. Appellant urges that, the advanced premium of \$1.60 was not paid, previous to the delivery of the policy. Respondent's reply, that under the provision and requirements of the application, to-wit: "the advanced premium of \$1.60 must be paid in advance without notice," the Home Office would not, and did not approve an application for insurance, until it had received the \$1.60 or waived the payment of same. At any rate, after approving the application, issuing the policy, and delivering same to the insured, it is prima-facie evidence of the payment, of the advanced premium. Without Burton's testimony, this evidence would be ample to justify and sustain a judgment. Whether or not Burton was telling the truth, in his testimony, was a question for the jury. And, the trial court recognizing the fact that it committed error in taking this case from the jury, did not abuse its discretion in granting respondent a new trial.

WOODSON, J.—This suit originated in the Court of Common Pleas of Pike County, brought by the plaintiff to recover the sum of \$400 on an insurance policy issued by the defendant to Hugh L. Lafferty for the use of Mollie M. Lafferty, his mother. At the trial, the court, at the conclusion of the evidence, directed a verdict for the defendant, and upon a motion for a new trial being filed, the court sustained the same, and in due time and proper form the defendant appealed the cause to the St. Louis Court of Appeals, which in due course affirmed the judgment of the lower court, but upon motion for a rehearing that court transferred the cause to this court, because it deemed its ruling was in conflict with the Springfield Court of Appeals in the case of *Gilmore v. Modern Brotherhood of America*, 186 Mo. App. 445.

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While the cause was pending in the Court of Appeals, REYNOLDS, P. J., in a very careful and ably prepared opinion, in which all the judges concurred, said:

"One Mollie M. Lafferty, mother of Hugh L. Lafferty, deceased, brought her action against the defendant company on a policy of insurance, of date January 9, 1914, under and by which defendant, among other things, promised to pay plaintiff the sum of \$400, on the death of the insured, resulting solely and directly from bodily injury sustained during the life of the policy. It is alleged that while the policy was in force Hugh L. Lafferty was killed by being run into and struck by a train of cars on the Chicago, Burlington & Quincy Railroad Company's track. Averring that Hugh L. Lafferty had performed all the terms and conditions of the contract of insurance on his part, but that defendant denies all liability on the contract and has failed and refused to pay plaintiff the indemnity due her, and that prompt and timely notice of the death of Hugh L. Lafferty had been given the defendant and blanks for proof of death requested of it but refused, plaintiff prays for judgment for \$400 with interest at six per cent from April 19, 1914, and costs.

"The answer after a general denial of all the averments of the petition and a special denial that Hugh L. Lafferty had performed all the terms and conditions of the contract, or that the insurance contract was ever executed or went into effect, it is set up that in the application for the policy which accompanied it there was a statement to the effect that Lafferty understood and agreed that the statements made were material representations to induce the issuance of the policy; that he warranted them to be full and complete and true; 'that the insurance hereby applied for will not be in force until the payment in advance of the premium and the delivery of the policy to me while I am in good health and free from all injury;' and that the advance premium of \$1.60 must be paid in advance without notice. It is further averred in the answer that no premium or payment for the insurance was made while Lafferty was in good health and free from injury, no

premium or payment was made thereon prior to the death of Lafferty, and that there was no consideration for the contract. It is further pleaded that if the contract of insurance sued upon was ever executed and put into effect, it was rescinded prior to the death of Lafferty by mutual oral agreement of the parties thereto. This answer was verified by an agent of the defendant company.

"It does not appear that a reply was filed, but the cause went to trial before the court and a jury, resulting in a directed verdict in favor of defendant. Plaintiff filed a motion for a new trial, which was sustained, and from this action defendant appealed. Pending the appeal, plaintiff died, and her death being suggested, her administrator duly entered his appearance.

"At the trial plaintiff introduced the policy and application in evidence and it was admitted that Hugh L. Lafferty came to his death from injuries received by being run into by a train on a railroad at Louisiana, Missouri, he being there on a visit, his home being at Moberly. This occurred about four o'clock on the morning of January 18, 1914.

"Plaintiff introduced and read in evidence the deposition of Miss Ada C. Sheldon, a stenographer and cashier of defendant at Kansas City, who testified, in effect that one Joseph Burton was the agent of the defendant at Moberly; that he sent into the home office at Kansas City an application of Lafferty for insurance in the amount of \$400; that the company had written a policy, duly signed by the proper officers, on the application, and sent it to Burton for delivery. This occurred about January 9, 1914. About that date she made out a blank receipt book for Lafferty as insured with defendant and an identification card, doing this in the usual course of business of defendant on receipt and approval of an application for a policy. Hearing nothing to the contrary from the local agent, she mailed these to him on January 20th. The book contained no acknowledgment of a receipt of any premium, but was a book in blank furnished for Lafferty's convenience, in the usual

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course of defendant's business, she not having received any notice that the policy had not been delivered to and accepted by Lafferty, or that he had not paid anything, and having no knowledge of his death having occurred on the 18th.

"On this evidence plaintiff rested.

"Defendant interposed a demurrer, which was overruled. It then introduced in evidence the deposition of Joseph Burton, who deposed to the effect that he was the agent of defendant at Moberly and had solicited Lafferty to take out accident insurance with the defendant company, and that Lafferty had made application for insurance amounting to \$400. This occurred about January 9, 1914, Lafferty agreeing that he would take the policy and pay for it upon the following Saturday, which was January 10, 1914. He did not, however, take the policy on that date, but on the 15th Burton submitted it to him for his inspection and approval, Lafferty agreeing to pay for the policy the afternoon of that day, if he took it, neither of which he then did; that the policy was left with Lafferty, because he stated he would like to look over it a little more fully before accepting and paying for it. This took place about January 15th. On the 17th following, Lafferty agreed with Burton to either return the policy to him or pay for it, promising to pay or leave the policy for Burton after supper on the evening of the 17th. About seven o'clock that evening Burton called at Lafferty's place of business in Moberly for the money or the policy, whichever Lafferty had left there, but got neither. Burton did not see Lafferty after that date. About eleven o'clock in the morning of January 19th, Burton first heard that Lafferty had been killed on the 18th in the railroad yards at Louisiana. Before he had heard that, and at about eight o'clock on the morning of the 18th, a Mr. Philpott, in whose bakery Lafferty had been employed, called Burton by telephone and asked him to call at his place of business as he wished to pay on Lafferty's insurance policy, and about eight o'clock that morning

Burton went to Philpott's place of business—Philpott and one Dessert being engaged in the bakery business—and asked Philpott what amount he wished to pay on the policy; what amount Lafferty had instructed him to pay, or had left with them to pay on the policy. He was answered by the parties there (Philpott and Dessert) that it did not make any difference; that they, referring to Philpott and Dessert, would pay whatever was due on the policy that Lafferty had in his possession. Burton asked Dessert if Lafferty had left a certain amount, and Dessert answered that he (Dessert) would pay whatever was due. This answer was objected to and stricken out, we think, improperly. Dessert then paid Burton \$3.60. This occurred before witness had heard of the death of Lafferty. Upon hearing that, he tendered the \$3.60 to Dessert and Philpott in the presence of a Mr. Rothwell. They refused to receive it. Witness afterwards sent the amount to Philpott, and also a like amount to Dessert, by registered mail, neither of which amounts were returned. This sending by registered mail occurred about five or six weeks after the death of Lafferty. Witness stated that he was not in the employ of defendant at the time of giving this deposition and had not been since about October, 1914.

“Another witness deposed to the fact that he was acquainted with Hugh Lafferty; had talked with him about taking out insurance with defendant, witness having a policy in that company, having applied for it about the same time that Lafferty applied for one. Just before Lafferty left Moberly for Louisiana on the 17th or 18th of January, witness was talking with him, and Lafferty told him that he did not think he would take defendant's policy and did not think he would pay for it; said he had a policy with another company that he liked better and was going to take that instead of the policy he had applied for through Burton; that he had a better policy with the Des Moines Company than defendant would give him; had paid for that policy, and did not think he would take defendant's policy.

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“Another witness corroborated the witness Burton as to the tender of the \$3.60 to Philpott and Dessert and their refusal to receive it.

“Defendant also offered and introduced in evidence an application which Lafferty had made to the Banker's Accident Insurance Company of Des Moines, Iowa, which had been received by that company about January 19, 1914, the application dated at Moberly, January 16, 1914, and in this application Lafferty stated that he had no accident or health insurance in any company, association or society. This was the evidence for the defendant. In rebuttal plaintiff offered in evidence the filing of the deposition of Samuel Philpott, taken by defendant in the case and filed January 28, 1915. Defendant's counsel objected to this and said he would read it himself, which he did. Philpott deposed that Lafferty had been in the employ of his firm at Moberly, engaged in the bakery business; that he had left Moberly on January 17, 1914, saying that he was going home, that being Louisiana, Missouri. Asked if he knew anything about Lafferty taking out an insurance policy, he said he did; that he had applied for one a month or six weeks before January 17, 1914; heard of Lafferty being killed on Monday morning, January 19th; heard it as soon as he got to his store Monday morning following; was told by his partner that Lafferty had been killed the day before; had received \$3.60 by registered mail from Mr. Burton shortly after the death of Lafferty.

“It should be stated that plaintiff objected to the testimony of Burton on the ground that he was an agent of the defendant company and acting as such in this transaction with Lafferty. This was overruled.

“The defense here is that the policy was neither paid for nor delivered. The fact of delivery or non-delivery is an affirmative defense. [Wells v. Hobson, 91 Mo. App. 379.] It follows that plaintiff made out a prima-facie case by introducing the policy and proving the death of Lafferty within the time covered by the policy, the death the result of external bodily injuries,

accidentally received. Learned counsel for appellant argues with great force that it appears affirmatively that Lafferty did not pay anything on this policy by way of premium or otherwise, and that the testimony of defendant shows affirmatively that the policy was never accepted nor delivered as a policy. That may be, but these were for the determination of the jury. [Erhart v. Dietrich, 118 Mo. 418, l. c. 426, 24 S. W. 188.] The possession of the policy raised the presumption that it had been delivered and paid for, or that credit had been given for the premium.

"Hence the first action of the trial court in taking the case was erroneous. This was afterwards corrected by that learned court, when he sustained the motion for a new trial.

"It is argued that the motion for new trial, if wrong on the ground that error had been committed in taking the case from the jury, or, more accurately, directing a verdict, might have been sustained on the ground that the verdict was against the weight of the testimony. No such presumption can be indulged in where there is an instructed verdict. In such situation the jury does not pass upon the weight of the testimony. So the position of learned counsel for respondent on this point is not tenable.

"The objection to the deposition of Burton, who had been the agent of the defendant company at the time of the transaction, was properly overruled. That is in accordance with the latest decisions of our Supreme Court, as see Wagner v. Binder, 187 S. W. 1128, in Division One, not to be officially reported, and Allen v. Jessup, by Division Two, not to be officially reported, but see 192 S. W. 720.

"The testimony offered on the part of defendant, tending to prove that Philpott and Dessert, in whose employ Lafferty was, or with whom he was connected in business, and who were the parties who made the payment of the premium to Burton, knew or had been informed of the death of Lafferty before they made that

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payment, was improperly excluded. It was not hearsay, which was the objection made to it, and it is binding on plaintiff for the reason that their act in making the payment of the premium was in law her act; in making the payment they were acting for and in the interest of plaintiff, and as she is seeking to avail herself of that act, she is bound by their knowledge, if they had any, of the fact of the death of Hugh L. Lafferty when or before they made this payment.

"It follows that the action of the learned trial court in sustaining the motion for a new trial is correct, based on the ground that by the prima-facie case made by plaintiff the case was one for the jury.

"The judgment granting a new trial is affirmed, and the cause remanded for further proceedings. *Allen and Becker, JJ.*, concur."

After a careful consideration of the case we are of the opinion that it is in conflict with the *Gilmore* case before mentioned, and for the reasons stated by the Court of Appeals in this case, that case is overruled and should be no longer followed.

The old familiar rule that the jury is the judge of the credibility of witnesses should not be overlooked, which must not be controlled or interfered with by the court. This is true whether the witnesses are introduced by the plaintiff in support of the allegations of the petition or by the defendant in support of the allegations of the answer. In other words, the rule mentioned absolutely bars the right of the court to instruct the jury to find for the plaintiff, even though hundreds of the most reputable witnesses of the community should testify to the facts stated in the petition; even though their testimony should be uncontradicted, the jury *must still* be the judge of the credibility of the witnesses and the weight to be given to their testimony, and the same would be true as to the testimony of as many other witnesses should they testify to the facts charged in the answer, for the jury alone *must* be the judge of their credibility and the weight to be given to their testimony, and in either case the court has *absolutely no legal*

authority to interfere with that *absolute prerogative* of the jury. [Gannon v. Gas Co., 145 Mo. 502.]

We hereby adopt the opinion of the Court of Appeals as the opinion of this court in this case.

For the reasons stated the judgment of the Common Pleas is affirmed. All concur; *Graves, J.*, in separate opinion.

GRAVES, J. (concurring).—I agree that the presumption of a delivery arose upon the showing that the policy was in possession of the deceased. This is purely a presumption as to the fact of delivery, and is a rebuttable presumption. Without adverse proof the presumption made a prima-facie case for the jury for plaintiff, but here we have the presence of the facts, destroying the presumption, if those facts are to be taken as proven. So that we get to the old question in Gannon v. Gas Co., 145 Mo. l. c. 515; Trust Co. v. Hill, 283 Mo. 278. The facts shown made a prima-facie case for the jury, and under Gannon v. Gas. Co., *supra* (a case which I have always followed, but at times with much reluctance), this prima-facie case left to the jury the determination of the credibility of the evidence offered by defendant. Under Gannon's case and its predecessors, and many successors (as late as Keller v. St. Louis Butchers Supply Co., at this term of the court) the delivery of the policy sued upon was for the jury. But, whilst under our rule the case should have been submitted to the jury, the trial court has the peculiar power to prevent the miscarriage of justice by setting aside a verdict which is against the weight of the evidence. [Keller v. Supply Co., *supra*.] This is one of the cases where the trial court should function aright on the motion for new trial, if such motion charges that the verdict of the jury was against the weight of the evidence. This question was not in the instant case, because there was, in the first instance, a directed verdict for defendant. It may be in a future trial of the case.

With these additional observations, I concur in the opinion.

LULU L. WAGONER, Appellant, v. GEORGE C. R.
WAGONER.

Division One, April 9, 1921.

1. **ADDITIONAL ABSTRACT.** Where appellant filed her abstract thirty days before the case was for hearing on the docket, an additional abstract filed by respondent two days before said docket date is barred from consideration by Rule 11. Nor can it be considered if no part of the record as a bill of exceptions.
2. **FRAUDULENT JUDGMENT.** Relief from a judgment obtained by fraud may be had in equity, and a judgment so obtained constitutes a defense in law, and no judgment so obtained can be made the basis of a recovery.
3. **DIVORCE: Vacation of Judgment for Maintenance.** A fraudulent decree of divorce entered in a Nevada court did not *ipso facto* vacate, as of its date, a decree for separate maintenance in favor of the wife previously entered in a circuit court of this State.
4. ———: ———: **Fraud.** A citizen of Missouri cannot, without cause, desert his wife, and without her knowledge or consent go to a distant state, in which he was never domiciled, and there procure a divorce in her absence which will *ipso facto* vacate a former judgment in her favor for maintenance in a Missouri court in which was adjudicated the same facts against him.
5. ———: **Jurisdiction.** The person whose matrimonial status is affected by a judgment for divorce must be in the jurisdiction where it exists. A citizen of this State does not take with him the interest of his wife in the marriage status, so as to subject it to the jurisdiction of any foreign court which he may find subservient to his purpose to get rid of her. The change of the domicile of the husband, who deserts his wife and goes to another state for the purpose of obtaining a divorce from her, does not draw after it the domicile of the wife.
6. ———: ———: **Judgment for Maintenance.** A decree of a wife residing in Missouri, against her husband for separate maintenance, fixed her matrimonial status separate from his, and when he wrongfully went into another state for the purpose of avoiding his marital obligations such other state did not become her matrimonial domicile, either actual or constructive; and he could not carry her separate matrimonial status to such other state and

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there use it to give jurisdiction to a court of that state to set aside a judgment of a Missouri court which had fixed it.

7. ———: ———: ———: **Wife's Domicile Following That of Husband.** Ordinarily the matrimonial domicile of the wife follows that of the husband; but when the matrimonial unity is destroyed by a decree of court founded upon his misconduct, or is wrongfully repudiated by him, her matrimonial domicile remains in the state of her residence, and the court of a foreign state into which he has gone for the sole purpose of obtaining a divorce from her does not so acquire jurisdiction as to destroy her separate matrimonial status fixed by the decree of the Missouri court. In such case, the court of the foreign state does not obtain jurisdiction of the *res*—her separate matrimonial status—and whatever may be the effect on his rights and duties of its decree granting him a divorce, it is void in all things relating to her matrimonial status, and does not affect her rights under a former decree of a Missouri court adjudging her entitled to an allowance for separate maintenance, for such decree established her innocence of wrong in the matrimonial relation and her further right to be his wife wherever she might lawfully be.
8. ———: **Jurisdiction of Foreign Court: Fraud.** The presence of the husband's own matrimonial status in the foreign state to which he had gone for the purpose of obtaining a divorce being jurisdictional, fraud in obtaining a matrimonial status there would go to the very foundation of the jurisdiction of its court to grant him a decree; and where his acts show that he dismissed his suit for divorce pending in a Missouri court for the purpose of seeking a more kindly jurisdiction in another state, and thereby vacated the order for alimony *pendente lite* so as to leave her without means to follow him, and secured a judicial welcome in the other state by engaging board at two hundred dollars per month at a hotel and hiring out as an ornamental clerk at a store for seventy-five dollars per month, it is manifest that he induced the court in the foreign state by actual fraud to assume jurisdiction of his suit for divorce.
9. **JURISDICTION: Service of Process.** Where the husband and wife had for years occupied a certain property as a home, and after he had brought suit for divorce the fraudulently induced her as a part consideration for an allowance of suit money to leave said residence, a service of process on a maid in said home, in her suit for a separate maintenance allowance, brought after he had dismissed his suit for divorce, the said maid and his mother being the only members of his family, is a valid service, and brought him into court, although he was not in the State at the time.

Appeal from St. Louis City Circuit Court.—*Hon. Vital W. Garesche*, Judge.

REVERSED.

Wm. B. and Ford W. Thompson and Randolph Laughlin for appellant.

(1) Past due installments of a judgment for future maintenance are within the protection of the full faith and credit clause of the Federal Constitution. *Sistare v. Sistare*, 218 U. S. 26. (2) The judgment in favor of Mrs. Wagoner operated to cause an indebtedness to arise in her favor as each installment of maintenance fell due, and the circuit court's power to modify could not operate retroactively on past due installments. *Sistare v. Sistare*, 218 U. S. 13; *Barber v. Barber*, 21 How. 582; *Livingston v. Livingston*, 173 N. Y. 377; *Goodsell v. Goodsell*, 82 N. Y. App. Div. 70; *Cotter v. Cotter*, 225 Fed. 475. (3) The maintenance judgment is an obligation of "the most binding force," and "for its payment no property of the husband is exempt." *Pickel v. Pickel*, 243 Mo. 663. (4) Such obligation is a property right, and constitutes "property" within the meaning of the Fourteenth Amendment. *Dorrance v. Dorrance*, 242 Mo. 625. (5) The Reno decree deprives appellant of her property, within the meaning of the Fourteenth Amendment. *Dorrance v. Dorrance*, 242 Mo. 625. (6) Where, as in this case, the due process protection of the Fourteenth Amendment is invoked, the decisions of the U. S. Supreme Court are controlling. *Atherton v. Atherton*, 181 U. S. 170; *Huntington v. Attrill*, 146 U. S. 657. (7) And a constitutional question is involved, which confers jurisdiction on this court. *Dorrance v. Dorrance*, 242 Mo. 625. (8) The Reno decree is void for six separate reasons, viz.: (a) There was no matrimonial domicile in Nevada, and therefore the *res*—the marriage status—never was within the judicial power of the Nevada court. (b) Wagoner him-

self had no bona-fide domicile in Nevada. (c) Independent of the above, no jurisdiction was acquired under the Nevada law. (d) The Missouri decree is prior in time, and is therefore controlling. (e) The Reno decree was obtained by fraud, and was part of a scheme and purpose to defraud appellant of her marital rights. (f) The Federal court's decision that the Reno decree was void is *res adjudicata* of its invalidity. (9) "The courts of the state of the domicile of the parties doubtless have jurisdiction to decree a divorce in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage, or to that of the commission of the offense for which the divorce is granted; and a divorce so obtained is valid everywhere." *Cheely v. Clayton*, 110 U. S. 705; *Atherton v. Atherton*, 181 U. S. 155; *Haddock v. Haddock*, 201 U. S. 562, 586, 587-604. (10) "If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile; and, in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicile, after reasonable notice to her, either by personal service or by publication, in accordance with its laws, is valid, although she never in fact resided in that State." *Cheely v. Clayton*, 110 U. S. 705; *Atherton v. Atherton*, 181 U. S. 164; *Gould v. Crow*, 57 Mo. 200; *Anthony v. Rice*, 110 Mo. 223; *Howard v. Strode*, 242 Mo. 210; *Blass v. Blass*, 194 Mo. App. 624; *Burlen v. Shannon*, 115 Mass. 438; *Hunt v. Hunt*, 72 N. Y. 218. (11) But where a wife is living apart from her husband with sufficient cause, as where the matrimonial domicile is in a particular state, and "the husband abandons his wife and goes into another State in order to avoid his marital obligations, such other State to which the husband has wrongfully fled does not, in the nature of things, become a new domicile of matrimony, and therefore, is not to be treated as the actual or constructive domicile of the wife." *Haddock v. Haddock*, 201 U. S. 570; *Barber v. Barber*, 62 U. S. 594; *Parker v. Parker*, 222 Fed. 190.

(12) In this case, the Reno court acquired no jurisdiction of the *res*—the marriage status—in that the parties never did live together as husband and wife in Nevada, and (a) The husband had wrongfully abandoned his wife before he went to Nevada, and had thereby lost his right to have the matrimonial domicile follow his own domicile. *Barber v. Barber*, 62 U. S. 594. (b) He never made any effort to exercise such right, if he had any, in that he never made any bona-fide (or other) attempt to induce his wife to follow him, or to translate the marriage status to Nevada soil. *Parker v. Parker*, 222 Fed. 191. (13) The matrimonial domicile, therefore, remained rooted in Missouri. It follows that the Nevada Court never had the *res* within the sweep of its judicial power, and the Reno decree is void for want of jurisdiction, and is therefore not “due process of law.” *Thompson v. Thompson*, 226 U. S. 562; *Haddock v. Haddock*, 201 U. S. 576; *Parker v. Parker*, 222 Fed. 191; *Pennoyer v. Neff*, 95 U. S. 733; *Taylor on Due Process of Law* (1917) secs. 139, 142. (14) The husband himself had acquired no bona-fide domicile in Nevada. (a) Where the wife is a non-resident, and the husband has no bona-fide domicile in the State decreeing the divorce, the court is without jurisdiction, the divorce judgment is void, and the decree is entitled to no faith and credit in any State. *In re Akin's Estate*, 152 N. Y. Supp. 310; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Bell v. Bell*, 181 U. S. 178; *Dunham v. Dunham*, 162 Ill. 589; *Thelen v. Thelen*, 75 Minn. 433; *Van Fossen v. State*, 37 Ohio St. 317; *Litowitch v. Litowitch*, 19 Kan. 451; *Sewall v. Sewall*, 122 Mass. 156; *Gregory v. Gregory*, 78 Me. 187; *People v. Dowell*, 25 Mich. 247; *Leith v. Leith*, 39 N. H. 20; *Magowan v. Magowan*, 57 N. J. Eq. 322; *Winston v. Winston*, 165 N. Y. 553, 189 U. S. 506; *Andrews v. Andrews*, 188 U. S. 41. (b) The recital in the proceedings in Nevada of the facts necessary to show jurisdiction may be contradicted on collateral attack. *Bell v. Bell*, 181 U. S. 178; *Thompson v. Whitman*, 18 Wall. 457; *Parker v. Parker*, 22 Fed. 191; *Kunzi v. Hick-*

man, 243 Mo. 103. (c) Said recitals have been contradicted in this case by evidence more cogent than that in any of the foregoing decisions, or in any other reported case. (d) The essential fact that raises change of abode to change of domicile is the absence of any intention to live elsewhere. *Williamson v. Osenton*, 232 U. S. 619. (15) "In order to make the divorce valid, either in the State in which it is granted or in another State, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first State requires." *Cheely v. Clayton*, 110 U. S. 705, 709; *Atherton v. Atherton*, 181 U. S. 164; *Kunzi v. Hickman*, 243 Mo. 113; *Thompson v. Thompson*, 226 U. S. 551; *Grannis v. Ordean*, 234 U. S. 393. (16) "In divorce proceedings, particularly where the State is a silent but interested party, constructive service is viewed strictly, and where there is no appearance every essential requisite of the statute for such service must affirmatively appear." *Parker v. Parker*, 222 Fed. 190; *Kunzi v. Hickman*, 243 Mo. 103; *Galpin v. Page*, 18 Wall. 350; *Shrader v. Shrader*, 36 Fla. 502. (17) Service upon the wife was not made strictly in accordance with the Nevada law in the following particulars, viz: (a) The writ of summons was fatally defective because it failed to state where or in what court, or when and on what day certain, the wife should appear and defend the cause. *Kunzi v. Hickman*, 243 Mo. 103. (b) The summons was published for only six weeks, instead of for three months. 2 Nevada Statutes 1912, sec. 5839, p. 104. (c) The Nevada statutes relative to service upon non-resident defendants in divorce actions are *in pari materia* with Sections 5026 and 5027, which provide for such service in civil actions other than divorce actions, and both will be permitted to stand as valid, the divorce sections as applicable exclusively to divorce actions, and the other sections as applicable exclusively to other civil actions. 2 Sutherland on Statutory Construction, secs. 443, 448, pp. 844, 854; also, sec.

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367, p. 705. (d) So much of Section 5839 as undertakes to delegate to the court or judge in vacation any right or power or authority to order notice of the pendency of the suit "to be given in such manner and during such time as shall appear most likely to convey knowledge thereof to defendant" was and is null and void, in that it undertakes to delegate to a judicial department of the government a power which the Constitution of the State of Nevada reposes in the legislative department, and in that it undertakes to substitute the caprice of the individual as to the time and manner of notice for the certainty required by law. Constitution of Nevada, art. 4, sec. 1, sec. 21; Black's Constitutional Law, sec. 105, p. 279; State v. Young, 29 Minn. 474; Cooley on Constitutional Limitations, sec. 116. (e) The glory of American law consists in clearly defining not only the causes wherefore, but the times when, the manner how, and the means whereby, the personal and property rights of the citizen may be invaded or abridged. Any enactment which fails to measure up to this standard of certainty is not American law, and American courts frequently declare statutes void for uncertainty. State v. Ashbrook, 154 Mo. 378; State v. Railway Co., 146 Mo. 155. (f) Where discretion exists, uncertainty exists. Matthews v. Murphy, 23 Ky. Law Rep. 750, 63 S. W. 785; Railroad v. Commonwealth, 99 Ky. 132; Commonwealth v. Railroad, 20 Ky. Law Rep. 491; State v. Cummings, 36 Mo. 278. (g) The Reno decree is void under the Nevada law for the further reason that the judge usurped the constitutional functions of the jury. Nevada Constitution, sec. 3, art. 1, p. 105. (h) This constitutional provision is self-executing and self-enforcing. It was not waived and could not be waived by Section 5845 of the Nevada statutes, or by any possible action of the court, or the judge of the court, or in any manner other than by the voluntary action of the wife herself. Nevada Constitution, sec. 3, art. 1; 24 Cyc. 154, sec. b, note 50. (18) Independent of any question of jurisdiction in the Nevada court: (a) The

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Missouri decree "was a decree not against but in favor of the wife in the maintenance suit, which decree necessarily conclusively settled that the separation was for cause and was without fault on the part of the wife." *Harding v. Harding*, 198 U. S. 338. (b) That decree foreclosed and merged all acts and conduct of both parties up to and including the date of its rendition. It determined the status of the wife as an innocent and injured party. "So far as it did that, it is a judgment that is operative and conclusive as to all the world." *Atherton v. Atherton*, 181 U. S. 168; *Harding v. Harding*, 198 U. S. 341. (c) It forever estopped the husband "from averring anything to the contrary" of that status, and any conflicting decree procured by him on such contrary averment, whether of the same or a sister state, is utterly and absolutely void. *Anthony v. Rice*, 110 Mo. 228; *Atherton v. Atherton*, 181 U. S. 172; *Harding v. Harding*, 198 U. S. 317; *Barber v. Barber*, 62 U. S. 582; *Sistare v. Sistare*, 218 U. S. 11. (19) When an inhabitant of this State goes into another State or country to obtain a divorce for any cause occurring here, and while the parties resided here, or for any cause which would not authorize a divorce by the laws of this State, a divorce so obtained is of no force or effect in this State. In all other cases, a divorce decreed in any other State or country according to the laws thereof, by a court having jurisdiction of the cause and both the parties, is valid and effectual in this State. *Atherton v. Atherton*, 181 U. S. 167; *Ross v. Ross*, 129 Mass. 248; *Hood v. Hood*, 11 Allen, 196; *Thompson v. State*, 28 Ala. 13; *Leith v. Leith*, 39 N. H. 39; *Shafer v. Bushnell*, 24 Wis. 372; *Gould v. Crow*, 57 Mo. 200; *Van Orsdal v. Van Orsdal*, 67 Iowa, 35; *Smith v. Smith*, 43 La. Ann. 1140; *In re James*, 99 Cal. 374; *Dunham v. Dunham*, 162 Ill. 607; *Shaw v. Shaw*, 98 Mass. 158; *Andrews v. Andrews*, 188 U. S. 41. (20) That Wagoner went to Reno to obtain a divorce is a presumption so strong as to wear the guise of certainty. And that one fact alone renders

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the Reno decree "fraudulent and void as to his wife." Gould v. Crow, 57 Mo. 203. Independent of that fact however, it stands admitted that: (a) Wagoner left Missouri for the purpose of placing himself beyond the jurisdiction of the court in which the maintenance case was pending; and he sedulously kept himself without the jurisdiction, and transacted all his local business—even his conferences with counsel—in East St. Louis and in Alton, Ill., without having paid any part of the maintenance due, or leaving uncovered any estate of any kind out of which it could be paid. (b) He did not disclose to the Reno court any of the circumstances of the St. Louis litigation, or the existence of the St. Louis suit, or of the St. Louis decree. (c) Contrary to the truth, verified by the St. Louis decree, he asked for a divorce on account of the alleged misconduct of an innocent and abandoned wife. In each of these three particulars there is enough fraud to defeat and impeach the Reno decree. Barber v. Barber, 62 U. S. 588. (d) Moreover, the affidavit made by Wagoner to his Reno petition that he had been a resident of Nevada for six months (whereas his own deposition now in evidence and uncontradicted shows that he had been a resident less than one month), was a fraud practiced upon the Nevada court—a fraud which renders the Nevada decree not merely voidable, but wholly void. Dorrance v. Dorrance, 242 Mo. 651. (e) Again, the fact that Wagoner dismissed his divorce suit in St. Louis, in the face of his wife's defense, left her there deserted and penniless, and thereafter re-filed his suit in Reno, well knowing that she was disqualified by destitution from litigating with him at such a distance from her evidence and from the charity on which she was dependent for support, was "a fraud upon the court for the purpose of depriving the defendant of the opportunity to be heard, which is the foundation of all legal process;" and was a fraud which "will vitiate any, even the most solemn transactions." Dorrance v. Dorrance, 242 Mo. 651. (f) Finally, we find the Reno divorce coming on the heels

of an elaborate and long-successful conspiracy to defraud the wife of her maintenance by fraudulent transfers of property, by flight, concealment, frequent change of abode, registration under an assumed name, destruction of books, records, and papers, and all the other arts, artifices, and devices of which the monster of chicanery is formed. Here, then, is a situation indubitably begun in fraud, and long colored by fraud, and in such circumstances the presumption is strong that fraud persists throughout the action. It is a case which calls for the application of the maxim: "The end of the act shall be construed by the beginning of the act, and the last part shall taste of the first." *Queen v. Saunders* (1572), *Plowden's Rep.*, p. 474. (g) Add to the above the long accumulation of fraudulent shifts, twists, and evasions detailed in our chronology, and you have a case more overwhelming in its arrogance, more overmastering in its conviction, than any to be found in the annals of American jurisprudence. It defies comparison. *Dorrance v. Dorrance*, 242 Mo. 625, 257 Mo. 317. (21) The Federal court's order of October 1st, 1917, overruling and denying the husband's motion for a temporary injunction to restrain the execution of the State court's decree—a motion raising the same issues as the instant motion—was *res judicata* of every question which it decided. *Johnson v. Latta*, 84 Mo. 139; *Appeal of Gardinier*, 89 Pa. St. 528; *Weber v. Tschetter*, 1 S. D. 205; *Langdon v. Raiford*, 20 Ala. 532; *Burritt v. Tidmarsh*, 1 Ill. App. 571; *Kaufman v. Schneider*, 35 Ill. App. 256; *Grier v. Jones*, 54 Ga. 154; *Day v. Mertlock*, 87 Wis. 577; *Robitshek v. Bank*, 72 Minn. 319; *McDonald v. Seligman*, 81 Fed. 753; *Buckles v. Railroad*, 53 Fed. 566; *Spitley v. Frost*, 15 Fed. 229; *Bank v. Haerling*, 106 Iowa, 505. (a) It was competent to show by parol testimony that Judge Dyer held the Reno decree to be invalid, and made such holding the ground of his order refusing an injunction. *Spradling v. Conway*, 51 Mo. 54; *Hickerson v. Mexico*, 58 Mo. 61; *West v. Moser*, 49 Mo. App. 201; *Haseltine v. Thrasher*, 65 Mo. App. 334;

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Short v. Taylor, 137 Mo. 517; La Rue v. Kempf, 186 Mo. App. 74. (b) In the Federal Court case the husband took the position that the wife was a party to that litigation by the doctrine of representation. We think that in this he was right, but whether he was or not, he is bound by the position he then assumed, and he will be held to it here. Starbuck v. Starbuck, 173 N. Y. 503; State ex rel. v. Holtkamp, 266 Mo. 366; Coleman v. Farrar, 122 Mo. 54; Boogher v. Frazier, 99 Mo. 331. (22) The Reno decree could in no event operate on property or property rights situated in Missouri. Those rights remain just as they were before, unmodified and unchanged by any judgment any Nevada court could pronounce on mere constructive service. Pennoyer v. Neff, 95 U. S. 714; Haddock v. Haddock, 201 U. S. 604; Parker v. Parker, 222 Fed. 191; Minor on Conflict of Laws, p. 184; Taylor on Due Process of Laws, sec. 143, p. 324; Barber v. Barber, 62 U. S. 588; Harding v. Harding, 198 U. S. 330; Wilson v. Railway Co., 108 Mo. 596; State ex rel. v. Blair, 238 Mo. 153. (23) In any event, the Circuit Court's power to modify could not operate retroactively on past due installments. Sistare v. Sistare, 218 U. S. 1, 13; Barber v. Barber, 62 U. S. 582; Goodsell v. Goodsell, 82 N. Y. App. Div. 70; Livingston v. Livingston, 173 N. Y. 377.

Fauntleroy, Cullen & Hay for respondent.

(1) A motion filed in the maintenance case is the proper remedy to vacate a continuing judgment, payable at stated periods in the future. Pritchard v. Pritchard, 189 Mo. App. 470; Creasy v. Creasy, 175 Mo. App. 237; Creasy v. Creasy, 168 Mo. App. 98; Bidwell v. Bidwell, 139 N. C. 402; 6 C. J. pars. 6 and 7, pp. 852, 853; Karren v. Karren, 60 L. R. A. 304. (2) When the right to demand and receive future alimony is discretionary with the court which rendered the decree, no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to

alimony has been made prior to the installments becoming due. *Lynde v. Lynde*, 181 U. S. 186; *Sistare v. Sistare*, 218 U. S. 11, 20 Ann. Cas. 1061, 28 L. R. A. (N. S.) 1068; *Barber v. Barber*, 21 How. 582; *Cotter v. Cotter*, 225 Fed. 471; *Mayer v. Mayer*, 154 Mich. 117, 19 L. R. A. (N. S.) 245, 129 Am. St. 477; *Cureton v. Cureton*, 132 Ga. 745; *Van Horn v. Van Horn*, 48 Wash. 338, 93 Pac. 670, 125 Am. St. 940; *Bleuer v. Bleuer*, 27 Okla. 25, 110 Pac. 736; *Hunt v. Monroe*, 32 Utah, 428, 11 L. R. A. (N. S.) 249, 91 Pac. 269. (3) The decree for maintenance being "until further order of the court," was subject to modification under the Missouri Laws. R. S. 1909, sec. 8295; 1 Ruling Case Law, sec. 92, p. 946; *Creasy v. Creasy*, 168 Mo. App. 110; *Creasy v. Creasy*, 175 Mo. App. 239; *Prichard v. Prichard*, 189 Mo. App. 470. (4) The decree of divorce entered by the district court of Nevada is valid on the theory of comity and public policy, and under the Constitution requiring that full faith and credit shall be given to proceedings in other States. *Howard v. Strode*, 242 Mo. 225; *Gould v. Crow*, 57 Mo. 204; *Anthony v. Rice*, 110 Mo. 227; *Lieber v. Lieber*, 239 Mo. 30; *Henderson v. Henderson*, 265 Mo. 738. (5) The prevailing doctrine is that such decrees are valid on the theory of public policy and comity between the States, and this is the established doctrine in Missouri. The Missouri cases, *supra*; *Gildersleeve v. Gildersleeve*, 88 Conn. 689; *Douglas v. Teller*, 102 Pac. 763; *Joyner v. Joyner*, 131 Ga. 217, 18 L. R. A. (N. S.) 647, 127 Am. St. 220; *McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546; *Knowlton v. Knowlton*, 155 Ill. 158; *Stevens v. Allen*, 71 So. (La.) 936, L. R. A. 1916-E, 1115; *Hekking v. Pfaff*, 82 Fed. 403; *Thompson v. State*, 28 Ala. 12; *Thompson v. Thompson*, 91 Ala. 591, 11 L. R. A. 443; *Re James*, 99 Cal. 374, 33 Pac. 1122; *Dunham v. Dunham*, 162 Ill. 589, 35 L. R. A.; *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; *Hilbish v. Hattle*, 145 Ind. 59, 33 L. R. A. 783; *Wakefield v. Ives*, 35 Iowa, 288; *Kline v. Kline*, 57 Iowa, 386, 42 Am. Rep. 47; *Van Orsdal v.*

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Van Orsdal, 67 Iowa, 35, 24 N. W. 579; Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071; Hawkins v. Ragsdale, 80 Ky. 353, 44 Am. Rep. 483; Smith v. Smith, 43 La. Ann. 1140; Benton's Succession, 106 La. 494; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340; Ditson v. Ditson, 4 R. I. 87; Thomas v. King, 95 Tenn. 60, 31 S. W. 983; Shafer v. Bushnell, 24 Wis. 372. (6) A decree of divorce rendered in another state is held valid even by the Supreme Court of the United States, where the plaintiff has in good faith fully complied with the laws of the state where the decree is granted and where he was a bona-fide resident of said state. Thompson v. Thompson, 226 U. S. 551; Atherton v. Atherton, 181 U. S. 155; Cheeley v. Clayton, 110 U. S. 701. (7) There is nothing in the Federal Constitution which prohibits a State court from recognizing a foreign divorce as valid. Finney v. Guy, 189 U. S. 345; Haddock v. Haddock, 201 U. S. 606; Howard v. Strode, 242 Mo. 225. (8) A cause of action for divorce in favor of a husband is not barred by a judgment for separate maintenance in which she obtains a decree. Watts v. Watts, 160 Mass. 464, 36 N. W. 479, 39 Am. St. 509, 23 L. R. A. 187. (9) The Nevada decree operates as *res judicata*, not only in regard to the existence of the plaintiff's cause of action, but as to the non-existence of the defense which was not pleaded. Roth v. Merchants Bank, 70 Ark. 200, 66 S. W. 918; Dunham v. Bower, 77 N. Y. 76, 33 Am. Rep. 570; Case Mfg. Co. v. Moore, 144 N. C. 527, 10 L. R. A. (N. S.) 734, and note; Morrill v. Morrill, 20 Ore. 96, 25 Pac. 362, 11 L. R. A. 155; Howard v. Huron, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493; Cromwell v. Sac County, 94 U. S. 351, 24 U. S. (L. Ed.) 195; Royston v. Horner, 86 Md. 249. (10) The question of alimony not only might have been, but should have been litigated in the Nevada divorce suit itself, and the judgment in said action, even though silent as to alimony, operates as *res judicata* not only as to the right to a divorce or separation, but as to the question

of alimony as well. *Howell v. Howell*, 104 Cal. 45, 37 Pac. 770; *Chapman v. Parsons*, 66 W. Va. 307, 24 L. R. A. (N. S.) 1015; *Wood v. Wood*, 59 Ark. 441, 27 S. W. 641, 28 L. R. A. 157; *Sprague v. Sprague*, 73 Minn. 474, 76 N. W. 268, 42 L. R. A. 419; *Julier v. Julier*, 62 Ohio St. 90, 78 A. S. R. 697; *Fischli v. Fischli*, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; *United States v. Bliss*, 172 U. S. 326. (11) The Nevada divorce is not void because it does not affirmatively appear that the Nevada court was informed of the maintenance suit. *Bader v. Bader*, 4 Am. & Eng. Ann. Cases, 854; 1 Cyc. 36; *Wood v. Wood*, 56 Fla. 882. (12) The final judgment entered by the court in the divorce case was a judgment upon the same rights of the same parties relating to the same subject-matter and was later in point of time and will therefore prevail; of two conflicting judgments, that which is later in time will prevail. *Stoltz v. Coward*, 10 Tex. Civil App. 295, 30 S. W. 935; 1 Freeman on Judgments, sec. 332; *Cooley v. Brayton*, 16 Iowa, 10. (13) There was no evidence of fraud or bad faith under any rule, and certainly none within the meaning of the rule which affects judgments. *Leiber v. Leiber*, 239 Mo. 31; *Blass v. Blass*, 194 Mo. App. 624; *Hanley v. Donoghue*, 116 U. S. 1; *Wisconsin v. Ins. Co.*, 127 U. S. 265; *Simmons v. Saul*, 138 U. S. 439; *Hilton v. Guyot*, 159 U. S. 113; *Rogers v. Alabama*, 192 U. S. 231; *L'Engle v. Gates*, 74 Fed. 513; *Christiansen v. Kriesel*, 133 Wis. 508, 113 N. W. 980. (14) The service by publication was in strict compliance with the laws of Nevada and sufficient in form to afford the requisite notice. *Clemson College v. Pickens*, 49 S. Car. 511; *Jasper County v. Wadlow*, 82 Mo. 172; *Osgood v. Osgood*, 153 Mass. 38; *Lewis v. Weidenfeld*, 114 Mich. 581; *National Bank of New York v. Bank of Boston*, 89 N. Y. 397; *Sherman v. Sherman*, 111 Pac. (Nev.) 286; *Pratt v. Stone*, 85 Nev. 365, 60 Pac. 514. (15) A refusal to grant a temporary injunction against the attorneys of a client not a party to the action is not *res judicata*, especially when the main case is dis-

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missed without prejudice. *Harrison v. Rush*, 15 Mo. 175; *Witthaus v. Savings Bank*, 18 Mo. App. 183; *Tanner v. Irwin*, 1 Mo. 65; *Johnson v. Board of Education*, 65 Mo. 47; *Williams v. Field*, 2 Wis. 421, 60 Am. Dec. 426, 24 Am. & Eng. Ency. Law (2 Ed.), 817. (16) Under the laws of Nevada, divorce cases are not triable by a jury. *Wuest v. Wuest*, 30 Pac. (Nev.) 886; *Maugels v. Maugels*, 6 Mo. App. 484; *Mead v. Mead*, 1 Mo. App. 247; *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456; *McFarland v. Mo. Pac. Ry. Co.*, 125 Mo. 253, 28 S. W. 590; *Grand Lodge Order of Herman Soehne v. Elsner*, 26 Mo. App. 108. (17) When a former pending case is dismissed before the hearing in the second case, it does not operate to abate the second case. *Martin v. Cotton Oil Co.*, 194 Mo. App. 111; *Warder v. Henry*, 117 Mo. 530; *State ex rel. v. Hines*, 148 Mo. App. 304.

BROWN, C.—This appeal is taken from an order or judgment of the Circuit Court of the City of St. Louis vacating its decree for maintenance entered on February 11, 1916, in the same suit, upon plaintiff's petition filed in said court April 30, 1915, in which she stated that she was married to defendant in September, 1887; that their home was at No. 4167 Lindell Avenue in the City of St. Louis until at or about February 5, 1913, when the defendant, without any cause, abandoned and deserted plaintiff, and that thereafter the plaintiff continued to reside at the same place; that respondent had a large amount of property and enjoyed a large income; that on May 16, 1914, he sued plaintiff for divorce, that she contested the suit and filed therein a motion for alimony *pendente lite*, which resulted in a stipulation that she would vacate the said residence and that he would pay her monthly alimony at the rate of one hundred and fifty dollars per month, which he did until February 10, 1915, when he dismissed his said divorce suit and had refused to make further payments of alimony, and had, without cause, deserted and abandoned her, and that she was without any means whatever for her support.

This decree was entered on said petition February 11, 1916, and contains a finding that the allegations of the petition are true, and that plaintiff was entitled to the relief prayed, and adjudged that she recover from defendant for her support and maintenance the sum of four hundred dollars per month, the first payment to be made on that date, and the further sum of seven hundred and fifty dollars suit money and her costs.

On October 8, 1917, the defendant filed his motion in this proceeding, wherein he stated that on November 21, 1916, he had recovered judgment in the District Court of Nevada for the County of Washoe, dissolving the bonds of matrimony theretofore existing between himself and plaintiff, that plaintiff had sued out execution on this judgment for maintenance, under which one share of stock of the Wagoner Undertaking Company, and one share of stock of the Wagoner Realty Company had been sold for \$4200, which was then in the hands of the sheriff, and that she had caused other stock to be levied on, and praying the court "to order that said judgment terminate on November 21, 1916, and to restrain the plaintiff from taking any action to enforce said judgment so far as it purports to give the plaintiff any right to a judgment after November 21, 1916."

The order or decree appealed from was made upon this motion and in accordance with its prayer, so that the only question raised by the appellant is whether or not the Nevada judgment which it pleads *ipso facto* vacated the judgment for maintenance, and entitled the respondent to injunctive relief against further proceedings for its enforcement.

The appellant pleaded to the motion among other things: (1) a suit by this respondent against appellant pending in the United States District Court for the Eastern District of Missouri, Second Division, asking the same relief, and involving the same issues; (2) a suit between the same parties and in the same court to sequester and impound property of this defendant for the satisfaction of this same judgment, in which the same facts are

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in issue, that is to say, the effect of the Nevada judgment; (3) a judgment of the said United States District Court in the said cause then and there pending refusing an interlocutory injunction against the enforcement of this same judgment on the same grounds now presented in this motion for the same relief; (4) that the judgment shows on the face of the judgment roll that the matrimonial domicile of both plaintiff and defendant was in the State of Missouri and that all the acts relied on as grounds for divorce were committed in the State of Missouri, while in fact the matrimonial domicile of both plaintiff and defendant had always been in St. Louis, where all the property of defendant was and always had been located; that this judgment, and the right to the relief granted, is a property right protected by Section 30 of Article 2 of the Constitution of Missouri, and Section 1 of the Fourteenth Amendment to the Constitution of the United States, of which the decree of the Nevada court attempts to deprive plaintiff without due process of law; (5) non-conformity with the laws of Nevada in obtaining jurisdiction of the defendant in the divorce suit.

It also pleaded fraud and perjury in the act of procuring the judgment in Nevada affecting the jurisdiction of the Nevada court.

There are no disputed *facts* in the case, and not much room for dispute in the inferences naturally flowing from such facts. The plaintiff and defendant were married at Greenville, Illinois, on September 8, 1887. According to his testimony defendant was at that time only twenty years old, and lived in St. Louis, where they intended at the time to make their permanent home. They did live there until they became separated during the difficulties of which this suit is one of the incidents. How old the plaintiff was at the time of the marriage does not appear in the evidence. It does appear, however, from the record, that they resided together in that city until sometime in 1913, when he left her living alone in the house at 4167 Lindell Avenue, and from which he threatened to eject

her, and a month or two afterward came to the house drunk at about two o'clock in the morning and broke through the front door with a club and entered. This he describes in evidence as one of his little pleasantries.

On May 16, 1914, defendant brought suit for divorce against plaintiff, alleging as the grounds therefor such indignities as to render his condition intolerable, and specifying that she refused to bear children; that on their wedding trip she quarrelled with him and refused to speak to him; that she was afraid to leave him alone in the house with the female servants; constantly boasted of the superiority of her ancestry and made disparaging remarks about his; was jealous, accused him of paying the expenses of a European trip for a young woman with whom she charged him with being madly in love, charged him with being intimate with different women with whom he associated, complaining that he would not come home when she wanted him and stayed out in the evening, and criticised him generally.

While this suit was pending he entered the house at 4167 Lindell Avenue where she resided, whereupon, fearing personal violence, she locked herself in a room on the second floor, and he thereupon refused to allow her counsel to have any communication with her; cut the telephone connection; ejected the maid, and brought his mother and sister-in-law to live in the house with the intention of forcing plaintiff to leave it.

On October 5, 1914, she filed her motion for alimony *pendente lite* and suit money, upon which this defendant promptly stipulated to pay her alimony at the rate of \$125 per month and she, through her attorneys, agreed to vacate the residence, which she promptly did. On the 8th of October, 1914, she filed her answer, in which she admitted the marriage and denied every other allegation of the petition. On January 30, 1915, he dismissed the divorce suit, ceased paying her the alimony adjudged by the court, and on April 26, 1915, transferred to his mother all his property, including stock in the Wagoner Undertaking Company, from which he was then realizing an

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income which he refused on the witness stand to estimate, and which the evidence then given shows to have been as much as \$20,000 per year. That she was absolutely destitute of means of support was adjudicated in this suit, and we find no evidence in the record which tends to show that the same condition does not continue.

That the transfer to his mother was made without any pecuniary consideration is not denied. It is admitted that his mother assumed and carried liberally the burden of his support, and he explains the transaction by saying that when this condition ceases at her death it will be his. When asked how this burden was assumed the mother says, "It was not in words, nothing was said in words;" and when pressed for some expression on her part of so important an undertaking, retorts with the question: "What would your mother say to you if you were going away?" The defendant says: "I turned this stock over to my mother by reason of the fact that I was the owner of it and had the right to do it, to do with it as I pleased." He also said: "It is a fact that since I turned over all of this stock to my mother I have been wholly insolvent and execution proof. I have not contributed anything to my wife's support since that time, no sir. I cannot come within \$20,000 of telling you how much the Undertaking Company made. I cannot come within \$20,000 of telling you how much it made in the year 1914. I cannot come within \$30,000 of telling you how much it made in either one of those years." He also said that at Reno his mother gave him the money to pay his board bills which were \$200 per month.

On May 5, 1915, respondent left St. Louis and from that time on seemed to be hunting diligently for a resting place. From the 6th of that month to the 11th he was at Walnut Log, Tennessee. From there he went to Alton, Illinois; then to San Francisco and to Los Angeles, and thence to various places in California. He seems to have made a flying visit to Reno in July, 1915, and again took up his pilgrimage from place to place and again arrived in Nevada on January 6, 1916; and put up

at the Riverside Hotel, where he engaged board at the rate of \$200 per month, which his mother furnished him the money to pay. During all that time he did not communicate with his wife and, to use his own elegant diction, he has communicated with her in no form, shape and manner since. He also says that he had no usual place of abode from the time he left St. Louis during his various wanderings, but he testifies as follows: "The purpose of my moving about among the twelve or fifteen resorts I have named, was to investigate the situation and conditions there with the object in view of permanently locating there." He was seeking rest and finding none. When he arrived at Reno on January 6, 1916, he felt that he had found a home. He also found a friend, Mr. Steinmetz, a dealer in furniture and carpets in that city, who not only accompanied him on fishing and hunting expeditions, but employed him in his store at a salary of \$75 per month. Mr. Steinmetz, testifying in his behalf in the Reno divorce case, said: "He took a great deal of interest in the store. He would come over there about noon when I went away to lunch, and most of the men were away at noon, and he would take part there, answering the 'phone, assisting in little general duties in the store. I am able to say that he has been a resident of Washoe County since early in January." The same witness testifying in a deposition taken at Reno on November 26, 1917, said: "Q. Did you before or have you since Mr. Wagoner's divorce suit, discussed with him the divorce suit? A. I hardly know how to answer that, Mr. Price. I know that he was here for a divorce." A week or two after the entry of judgment in his divorce case Mr. Wagoner seems to have abandoned all idea that he resided in Nevada.

This appeal was taken March 28, 1918; the short transcript filed April 2, 1918; and was set for hearing in this court and was heard and submitted on January 23, 1920.

Appellant's abstract of the record was filed and served on December 23, 1919. On January 21, 1920, the

respondent filed his brief containing an additional abstract of the record as follows: "The testimony on plaintiff's motion for allowance *pendente lite* filed October 12, 1917, and overruled October 31, 1917, is omitted from the record prepared by appellant. The testimony so omitted showed that the plaintiff became the half owner of 640 acres of land in Illinois upon being divorced from defendant, and the proof showed that said land was of the value of \$100 per acre."

The appellant thereupon and on the day of the hearing, filed its motion to strike said additional abstract from the files as being out of time under our Rule 11; that the matters so set out were not contained in the bill of exceptions which was brought into court and filed for our inspection; and were false.

This motion was taken with the case. On February 16, 1920, the respondent filed with the clerk of this court a purported copy certified by one describing himself as "acting official stenographer of the trial court," of testimony taken in said court on October 25, 1917, on a motion of plaintiff for an allowance *pendente lite*, which tended to show that by the will of appellant's mother, who died in Illinois on April 28, 1916, she devised 480 acres of land, estimated by the respondent's witness to be worth from \$80 to \$125, to her two daughters, the devise to appellant to take effect upon the death of respondent or appellant's divorce from him. The condition of the estate was not shown. The will appointed the sister, Miss Blanchard, executrix and trustee.

1 We do not think that either the statement in respondent's brief under the title of "Additional Abstract," to which we have referred in the closing paragraph of the foregoing statement, nor the paper filed since the hearing, purporting to be copied from the stenographer's notes of evidence received upon the hearing of another motion in the principal case, should be considered by us as a part of this record, for the following reasons:

**Additional
Abstract.**

(a) Were it really a part of this record it was filed so far out of the time permitted by our Rule 11 without excuse or explanation for the delay that its consideration would establish a precedent destructive of the rule.

(b) The notes are so much at variance from the statement of the additional abstract as to indicate entire absence of care in preparing the latter version of the fact.

(c) It constitutes no part of the record of this trial as the bill of exceptions does not show that it was introduced or otherwise considered in this hearing.

We are relieved from all embarrassment by the fact which will presently more fully appear, that the testimony referred to, if properly before us, would have no bearing upon the questions which we shall consider.

II. The sole question brought before us by this appeal is whether or not the decree of divorce entered in the Nevada court at Reno on November 11, 1916, vacated, *ispo facto*, as of its date, the decree for separate maintenance in favor of appellant and against respondent entered on February 11, 1916. This point is unmixed with any question relating to the power or duty of the St. Louis court to modify or vacate its decree for separate maintenance on any other ground. It follows that whatever we shall say will be limited to the validity, force and effect of the Nevada decree in that respect alone. In considering this we will ignore interesting propositions presented in argument as to the irregularity of the proceedings under which the Nevada court undertook to acquire jurisdiction of the defendant under the laws of that State, except in so far as they suggest fraud in that respect, for, in every civilized country, so far as we know, the law refuses to lend the aid of its process to the accomplishment of fraud. As was long ago said by an American court in *Mitchell v. Kintzer*, 5 Pa. St. l. c. 217: "In the eye of the law, fraud spoils everything it touches. The broad seal of the Commonwealth is crumbled into dust, as against the interest designed to be defrauded. Every transaction of life be-

**Fraudulent
Judgment.**

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tween individuals, in which it mingles, is corrupted by its contagion. Why then, should it find shelter in the decrees of courts?" "Even the terms of an act of the Legislature cannot be made an instrument of fraud, but must yield to the honest purpose for which it was enacted." [Lightner Mining Co. v. Lane, 161 Cal. l. c. 698.] And as has been said by us in numerous cases, "When fraud in obtaining a judgment is made to appear, the estoppel of the judgment vanishes." [Lewis v. McCabe, 76 Mo. l. c. 309; Callahan v. Griswold, 9 Mo. 784; Edgell v. Sigerson, 20 Mo. 494; Ward v. Quinlavin, 57 Mo. 425; Dorrance v. Dorrance, 242 Mo. l. c. 651-2; United States v. The Amistad, 15 Pet. l. c. 594.] "Relief may be had from it not only in equity, but it constitutes a defense at law, so that no judgment can be recovered on a cause of action tainted with fraud." [Dorrance v. Dorrance, *supra* and cases cited.] This principle is so often stated that it may appropriately be called a platitude of the law. It is the protest of the courts of both law and equitable jurisdiction, against being made the instruments of fraud. They may be deceived to the detriment of innocent suitors, but this deception will not be permitted to ripen into injury unless the suitor has been given an honest opportunity to protect himself. Judged by this standard we are to inquire whether the appellant was, in the procurement of the Nevada decree wrongfully and by artifice equivalent to actual deceit, deprived of that opportunity.

There is nothing in this record which tends to impeach the character of appellant, or to cast doubt upon her faithfulness to every connubial duty during the twenty-nine years of the marriage relation between her and the husband, unless it be found in the act of the Nevada court in entering its decree of divorce. Even the complaint upon which it was entered is ridiculous in the light of the charge of extreme cruelty which it was framed to sustain. Neither that pleading nor the evidence contains a word of specification which sustains the charge. It begins with the statement that ten days after the marriage and while on the wedding trip she "pub-

licly and in the presence of strangers upbraided and harangued the plaintiff," and runs down the gamut of the English alphabet to the letter "p," under which it specified that she is a person of irascible temperament and nagging and fault-finding disposition. All these things are alleged to have been done in the City of St. Louis and necessarily before the entry of the decree for maintenance now before us, and during the time when the parties were living together as husband and wife before the institution of the divorce suit of respondent against appellant, which we will have further occasion to notice.

The service of the original process in the Nevada suit was by publication and the mailing of a copy of the notice published to the appellant at the Windermere Hotel in St. Louis. She was living with her own people at Greenville, Illinois, at the time, but received the letter in due time and took it to St. Louis and gave it to her attorneys, Lehmann & Lehmann and Thompson & Thompson. She was without money and unable to go to Reno or to take any other steps in the case, while her attorneys were unwilling to make or finance any defense in Nevada, and did not think it was necessary on the ground that the Nevada court had acquired no jurisdiction. In this way it came to pass that she made no appearance in that suit, which resulted in the decree of divorce upon which respondent depends to sustain the judgment of the trial court.

Whether the Nevada court obtained jurisdiction of the appellant by these proceedings calls for a brief consideration of the facts.

After the parties had been married as much as twenty-five years, and lived in apparent peace in St. Louis, in their home at 4167 Lindell Boulevard, some trouble arose between them. On February 5, 1913, he abandoned her, leaving her in the house alone, and has not lived with her since. He finally broke in on her possession of the house with a club with which he smashed the glass of the front door. This transaction he describes in testimony as one of his little pleasantries.

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On May 16, 1914, he brought suit for divorce against her, alleging "indignities," the most of which are alleged against her as "cruelties" in his Nevada complaint. To this she filed a motion for alimony *pendente lite* which was allowed in a very moderate amount by stipulation. She then answered, and gave notice to take his deposition. On February 1, 1915, he dismissed his divorce suit and she instituted, in the same court, her suit for separate maintenance under our statute, on the ground of abandonment. This, after a warm contest over the service of process, resulted in a judgment for maintenance at the rate of \$400 per month.

At the death of respondent's father in 1906, he had succeeded to certain stocks and other securities which became very valuable. Among these was a block of stock in the Wagoner Undertaking Company. He declined to state his income on these, but the evidence shows that it had reached twenty or thirty thousand dollars per year, and perhaps more.

After the dismissal of his divorce suit the respondent prepared for trouble. He paid his wife no alimony. She was destitute, and he knew she contemplated bringing a suit for separate maintenance, and paid her one hundred dollars to delay it so that it would not be returnable at the next April (1915) term, and on April 26, 1915, he transferred everything he had, including the securities we have described, to his mother. There is no pretense that he received anything from her for this property. He says he transferred it to her because it was his and he had the right to do so, and that his mother agreed to support him. She was examined and knew nothing about the income except that it was sent to the respondent in such sums as he needed. He then undertook to gather the fruit of appellant's promise to delay any further proceeding until after the April term by a pilgrimage in which his mother and another woman whom she describes as a dear friend joined him. During the months that succeeded they visited many states, but ignored the resorts in which Missouri process could be served so

carefully that it was necessary for his St. Louis attorneys to go to the other side of the river for consultation with him. His mother testified that his wife, the appellant, had everything to do with this pilgrimage, which he contended blotted his home from the map of the State, and, without success, contested service of process in this case by delivery at his St. Louis residence.

In 1916 he arrived in Reno, engaged a room and board at a hotel for which he paid \$200 per month, and hired himself out to a furniture and carpet firm, who agreed to pay him \$75 per month for his services, which Mr. Steinmetz, one of the firm, testified consisted in coming down at noon while the other employees were at dinner and answering the telephone and talking over the business. He says Mr. Steinmetz is his friend, and that is probably true. But the friend testified that he understood that respondent was there for a divorce.

He left Reno and Nevada a week or two after the decree was entered and returned to St. Louis, which he then testified was his home, and also testified that he had determined to take up his residence in Nevada in August, 1916, which was the very month in which his petition for divorce was filed.

The record is replete with evidence of this character, which not only proves but admits that in 1913 the respondent had made up his mind to get rid of his wife. This is so evident that it does not call for discussion of the incidents which tend to explain the origin of this determination. That he instituted the divorce suit against her under the impression that she would not fight is demonstrated by the subsequent course of the suit. When she filed her motion for alimony *pendente lite* he made the best bargain with her he could, but was careful to stipulate that she should leave the residence where they had passed many years of their married life. When she finally answered, his hope of controlling her vanished. He stopped paying her the stipulated sum of \$125 per month, and determined to pursue his game in other fields. He found, either through outside informa-

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tion or in the fertile ground of his own consciousness, that the dismissal of the suit would not put an end to his trouble, and his subsequent acts were all adjusted to the theory that she was in the right, and that his one chance of success in the scheme to get rid of her was to keep her too poor to fight, and to prostrate the process of the law to his purpose. She was needy and he was wealthy, and he negotiated with her necessity with such success that for the payment of \$100 he secured her promise not to bring suit against him, returnable to the term of the St. Louis Circuit Court which would begin in a couple of months. He then immediately transferred all his property to his mother and left the State, leaving the mother and her maid the only occupants of his residence, and it was to the maid that the process was delivered by the sheriff when service in this suit was obtained. Being absent, the sheriff took up his cause, and having discovered that his mistake in entering the exact facts in his return amounted to service on his friend, he moved to amend, which privilege was denied. There was then no time to lose and he started on the trip to expatriate himself.

It having been adjudged by the St. Louis Circuit Court that he had, while still a resident of Missouri, and an occupant of his own house, been properly served with process, the suit for separate maintenance proceeded to final judgment in appellant's favor upon the only ground authorized by the statute upon which it rested, wrongful abandonment by the respondent, with an express finding that appellant was the innocent and injured party.

That the respondent was ever domiciled in Nevada is too absurd for serious consideration. The only evidence of the fact is his own statement that when he arrived there in January, 1916, he thought he would make it his home. After remaining six months as the law required as a condition precedent to his suit for divorce, he filed his complaint for that purpose, and the proceeding so instituted proceeded with celerity to final decree, upon which he promptly left. His citizenship began for the accom-

plishment of that purpose and ended with it. It applied to no other phase of respondent's life or activity than the act of which it constituted a part. One cannot be domiciled in two states at the same time, and if a Missourian should go to Nevada under a contract to work six months, his intention to return to his home or remain in Nevada would constitute the key to his citizenship.

With these facts before us we cannot become *particeps criminis* by ignoring their logical effect. They squarely present the question whether a citizen of Missouri may without cause, desert his wife, and without her knowledge or consent, go to a distant State the judicial process of which cannot run outside its limits, and procure a divorce in her absence which will *ipso facto* vacate a former judgment of our court in her favor adjudicating the same facts against him. There being no disputed facts within the limits of this proposition we have only to consider the law.

III. At the outset we are impressed by the fact that this country, so far as it is necessary to consider the nature and extent of its powers and duties in this case, consists of a union of sovereign states, independent with respect to the making and execution of its own laws subject to the constitutional authority of the general government, which binds it together as one people. The jurisdiction of each state, subject to the limitation imposed by the Constitution, is absolute over all persons and things within its limits and is protected from legislative interference on the part of the nation or of its sister states by the Tenth Amendment to the Federal Constitution. To the extent only of its own sovereignty are the records of its judicial proceedings entitled to full faith and credit in other states. When its courts act outside their territorial jurisdiction, that is to say, upon persons and things having no existence within the limits of their process, their acts are without jurisdiction and void. To illustrate: One who holds a promissory note against a citizen of another state cannot, by publication or process from his own state, reach

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subject to the constitutional authority of the
general government, which binds it together
as one people. The jurisdiction of each state,
subject to the limitation imposed by the

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the domicile of his foreign debtor and bring him constructively into a court of his own state and thereby obtain a judgment against him in his absence from the jurisdiction. In such case there is no jurisdiction of the person. On the other hand, if the debtor has property in the state of the creditor's domicile, the latter may attach it and thereby obtain jurisdiction, and a judgment against the thing attached, the debtor being at liberty to come into the court in defense of his property or not as he pleases.

The jurisdiction in divorce cases as between the states is equally plain and simple.

Although marriage, by statute in this State is considered a civil contract (R. S. 1909, sec. 8279), the matrimonial status itself is a matter of public concern, and amenable to the law of its domicile, and subject to legal control in that jurisdiction only. The person whose matrimonial status is to be affected must be in the jurisdiction where it exists. This place is called in law the matrimonial domicile of the person.

In this case the respondent, after his wife had been stripped of the means to follow him, left his home and state without disclosing to her his itinerary, and doubled upon his own track from resort to resort until he found the place where, without danger of being followed by his impecunious spouse, he could obtain a divorce with ease and dispatch. Can it be said in such a case that he takes with him the interest of his wife in the marriage status, so that he may subject it to the jurisdiction of any foreign court which he may find subservient to his purpose?

This evidently depends upon the place of her matrimonial domicile under the conditions so existing. The general rule is that the matrimonial domicile or place in which the matrimonial status of both parties has its abode is that of the husband. But, as is said by a distinguished author on *The Conflict of Laws* [1 Wharton (3 Ed.) sec. 224.]: "In the United States, from our peculiar position as a confederation of independent sovereignties, contiguous, but each with its distinctive mu-

nicipal law of divorce, the difficulties of the rule soon became manifest. A man might give his wife cause for divorce and then defy her and defy the law, by putting it out of her power to avail herself of this cause. That which is an aggravation of the offense would become its shield. Deserting her, he might take up his home in a remote state, where she could only pursue him at great expense, encountering a jurisprudence selected by him as the most unfavorable to her claims. Or he might drive her, by his cruelty, to another state, compelling her, if she sue him, to sue as an alien, with the burdens attending one instituting proceedings in a foreign land. Or, what would be still more oppressive, he might steal a march on her and proceed to a jurisdiction with lax laws of divorce, and sue her in that jurisdiction, that being constructively her domicile, though within its bounds she had never set foot, and yet whose laws would be treated as binding her absolutely. So iniquitous is this, that in Massachusetts, in a celebrated case, it was ruled that for divorce purposes a woman can adopt her permanent residence as her domicile, and in this sue, or, if sued, set up its laws as those to which she is subject. This case has been followed in most of the states of the American Union."

It would be difficult to state the facts of this case in clearer language than that which the author has chosen to illustrate the wrongs which might flow from the rule which he shows no longer exists in American jurisprudence.

The question of jurisdiction in such cases, under the Federal Constitution, is subject to the final determination of the Supreme Court of the United States, and for that reason we call attention to the following adjudications of that tribunal upon the question.

In *Barber v. Barber*, 62 U. S. 582, l. c. 594, that court said that "when parties are already living under a judicial separation, the domicile of the wife does not follow that of the husband." In *Hartean v. Hartean*, 14 Pickering, 181, 185 (the case referred to in the above

quotation from Wharton), Chief Justice SHAW for the Supreme Judicial Court of Massachusetts, said: "But the law will recognize a wife, as having a separate existence, and separate interests, and separate rights, in those cases where the express object of all proceedings is to show, that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicile and home." And in speaking of the separate domicile of the wife he said: "That after such right has accrued, it cannot be defeated, either by the actual absence of the other party, however long continued *animo revertendi*, or by a colorable change of domicile, or even by an actual change of domicile; and that it shall not be considered in law, that the change of domicile of the husband draws after it the domicile of the wife to another state, so as to oust the courts of this State of their jurisdiction, and deprive the injured wife of the protection of the laws of this commonwealth and of her right to a divorce."

In *Haddock v. Haddock*, 201 U. S. 563, l. c. 576, the Supreme Court of the United States through Mr. Justice WHITE spoke to the very case we are now considering as follows:

"It is urged that the suit for divorce was a proceeding *in rem*, and, therefore, the Connecticut Court had complete jurisdiction to enter a decree as to the *res*, entitled to be enforced in the State of New York. But here again the argument is contradictory. It rests upon the theory that jurisdiction in Connecticut depended upon the domicile of the person there suing, and yet attributes to the decree resting upon the domicile of one of the parties alone a force and effect based upon the theory that a thing within the jurisdiction of Connecticut was the subject-matter of the controversy. But putting this contradiction aside, what, may we ask, was the *res* in Connecticut? Certainly it cannot in reason be said that it was the cause of action or the mere presence of the person of the plaintiff within the jurisdiction. The only possible theory then upon which the proposition proceeds

must be that the *res* in Connecticut, from which the jurisdiction is assumed to have arisen, was the marriage relation. But as the marriage was celebrated in New York between citizens of that State, it must be admitted, under the hypothesis stated, that before the husband deserted the wife in New York, the *res* was in New York and not in Connecticut. As the husband, after wrongfully abandoning the wife in New York never established a matrimonial domicile in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut. Conceding, however, that he took with him to Connecticut so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the status of the wife. From any point of view, then, under the proposition referred to, if the marriage relation be treated as the *res*, it follows that it was divisible, and therefore was a *res* in the State of New York and one in the State of Connecticut. Thus considered, it is clear that the power of one State did not extend to affecting the thing situated in another State."

In *Thompson v. Thompson*, 226 U. S. l. c. 562, the same court speaking through Mr. Justice PITNEY with apparent approval of the *Haddock* case, and distinguishing it from the case in hand, said: "In the *Haddock* Case, the husband and wife were domiciled in New York, and the husband left her there and, after some years, acquired a domicile in Connecticut, and obtained in that State, and in accordance with its laws, a judgment of divorce, based upon constructive and not actual service of process on the wife, she having meanwhile retained her domicile in New York, and having made no appearance in the action. The wife afterwards sued for divorce in New York, and obtained personal service in that State upon the husband. The New York court refused to give credit to the Connecticut judgment, and this court held that there was no violation of the full faith and credit clause in the refusal, and this because there was not at

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any time a matrimonial domicile in the State of Connecticut, and therefore the *res*—the marriage status—was not within the sweep of the judicial power of that State.”

In *Parker v. Parker*, 222 Fed. l. c. 191, the United States Circuit Court of Appeals for the Fifth Circuit said: “The obligatory recognition of such a decree beyond the limits of the state depends, however, upon whether there was jurisdiction of the matrimonial relation of the parties. That relation may not follow the domicile, of the offending husband. If the adopted residence is intended to perpetrate a fraud on the innocent wife, or if the wife is without fault, and was deserted, the matrimonial domicile remains in the state of her residence. The law is well settled on this subject in *Barber v. Barber*, *supra*.” It also quotes with approval from *Barber v. Barber*, *supra*, as follows: “Where the domicile of matrimony is in a particular state, and the husband, abandoning the wife, wrongfully goes into another state in order to avoid his marital obligation, such other state does not become a new domicile of matrimony, nor the actual or constructive domicile of the wife. That (the matrimonial domicile and that of the wife) continues in the original state until she actually acquires a new one.”

In this case the wife was residing in Missouri, under judicial decree obtained against her husband upon personal service. That decree fixed her matrimonial status separately from him.

The question here is whether he can put this separate matrimonial status adjudged to his wife into his own pocket, and carry it to Nevada, and there use it to give jurisdiction to a court of that state to set aside the judgment of the Missouri court which fixes it. This absurd proposition is answered definitely by the court which is the final arbiter in the matter, and we see nothing in the cases cited by respondent to the contrary. They all proceed upon the well-established theory that ordinarily the matrimonial domicile of the wife follows that of the husband. This is true, for there can be but one such domi-

cile while it is her duty to live with him. They are matrimonially one person, and, as such, can have but one abiding place. When that unity is destroyed by a decree of court founded upon the misconduct of the husband, or is wrongfully repudiated by him, the law permits her to get bread and the shelter of a home without surrendering her matrimonial right.

This doctrine covers completely the facts of this case and if any court has inadvertently disregarded it we need not follow it into the error. It follows that the Nevada court having no jurisdiction of the *res*—the subject-matter of this suit—its decree, whatever may be its effect on the rights and duties of the respondent is void in all things relating to the matrimonial status of the appellant, inclusive of the judgment of the St. Louis Circuit Court which established her innocence of wrong in the matrimonial relation and her desertion by respondent together with her right to be his wife wherever she might lawfully be. This is for her the *situs matrimonii*.

IV. That the Nevada court was induced by actual fraud to assume jurisdiction is evident. That respondent dismissed his divorce suit in Missouri for the purpose of seeking a more kindly jurisdiction is shown by his subsequent movements which converted this intention into an accomplished fact. In this he contemplated the legal effect of his action as vacating the order for alimony *pendente lite* so as to leave her without funds to follow him. He then took advantage of her impecunious condition to induce her, for \$100, to delay further proceedings for her support while he should escape from the jurisdiction. She scrupulously performed her part of this agreement, but he failed to escape because when he crossed the river he left his mother and her maid who constituted his entire family, behind him in the family domicile. When he finally drifted into Reno, the haven of his hopes, he prepared himself for judicial welcome by engaging board for two hundred dollars per month and hiring out for seventy-

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five dollars per month. The presence of his own marriage status being jurisdictional, fraud, in that respect, would go to the very foundation of the jurisdiction of the court.

It is, as we have seen, unnecessary to consider to what extent he might be estopped from availing himself of his own fraud to deny the validity of the judgment. The question is not before us.

Nor will we uselessly discuss or determine whether or not an action will lie in a foreign state to dissolve the bonds of matrimony between the parties for acts done by the defendant while they were living and cohabiting together and domiciled in this State; which were no cause for divorce under our laws. Although the record before us presents this question, it is unnecessary, in view of what we have already said, to consider.

For the reasons stated in this opinion the judgment of the St. Louis Circuit Court vacating the order for separate maintenance is reversed. *Ragland and Small, CC.*, concur.

PER CURIAM:—The foregoing opinion by Brown, C., is adopted as the opinion of the court. All the judges concur, *Goode J.*, in the result.

CASES ARGUED AND DETERMINED

BY THE

SUPREME COURT

OF THE

STATE OF MISSOURI

AT THE

APRIL TERM, 1921.

LOUIS BERNERO, an infant, by Lorraine T. Bernero,
Curatrix of his Estate, Appellant, v. ST. LOUIS
UNION TRUST COMPANY et al.

In Banc, April 30, 1921.

1. **WILLS: Construction of: Testator's Intention: How Ascertained.** The cardinal rule for the construction of wills is to have due regard to the directions of the will and the true intent and meaning of the testator, which is to be gathered from the will itself and the whole of it, viewed in the light of the circumstances surrounding its execution.
2. ———: ———: ———: ———: **Interpolating Words.** In cases where a clear and definite provision is followed by a repugnant or inconsistent provision not equally clear and definite, tending to defeat or cut down the prior one, or where the provision sought to be sustained by the actual words used is against the manifest intention of the testator, as gathered from the entire instrument, or where the exact wording, of vague and uncertain meaning, would result in a disposition of the property devised utterly at variance with the natural instincts of the testator, such as the defeat of succession in title in the heirs of a favorite child of testator for the benefit of strangers, the court may interpolate words in order to carry out the intention of the testator.
3. ———: ———: ———: ———: ———. To justify the court, when seeking to construe a will, in interpolating words to arrive at the

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testator's intention, the will, on its face, must show some contradiction or repugnancy, or that it is incomplete; and it must then further appear from the face of the will itself that the testator has inadvertently or unconsciously omitted certain words or language which are necessary to make his intention clear, and also what words or language have been omitted and that the testator clearly intended to make a disposition which the supplied words will effectuate.

4. ———: ———: ———: ———: ———. Where the meaning of the testator has been clearly and distinctly expressed in plain and unequivocal language, the court will not supply or interpolate words not used by the testator, however much the testator's disposition of his estate may appeal to the court as hard and unnatural.
5. ———: ———: **Particular Estate Dependent on Contingency: Limitations Consecutive Thereon Likewise Dependent.** When a contingent particular estate is followed by other limitations, the rule is that, if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and, therefore, appear not reasonably applied to the ulterior limitations.
6. ———: ———: **Case Adjudged.** The testator devised certain real estate to his wife to have and enjoy during her natural life and at her death the same to pass to their adopted son, if he should survive her, to have and enjoy during his natural life, and at his decease to pass to and vest in fee in his children if any he have, or their descendants, but in default or failure of such direct heirs, children or grandchildren him surviving, then at the time of his death the title to said realty in fee should pass to and vest in testator's right heirs; if, however, testator's said wife should survive said adopted son, then she, said wife, was thereby empowered to devise said realty as she should see fit, or if she should fail to make such testamentary disposition of same, then said realty, upon her death, should vest in testator's right heirs, if she should survive said adopted son. The adopted son married after testator's death, and had one child, the plaintiff herein, and then died before testator's wife. Thereafter testator's wife died testate and by her last will exercised said power to devise said realty and devised the same in trust for the children of her sister, and made a request of \$10,000 to a trustee in trust for plaintiff. This suit is one to quiet title to said realty in plaintiff, who claims a fee. *Held*, that the life estate of testator's adopted son, plaintiff's father,

was contingent upon his surviving testator's wife and the remainder in fee to said son's descendants was likewise dependent upon the same contingency and that, inasmuch as said son predeceased said wife, the plaintiff took no title to or interest in said realty, under said will. (HIGBEE and WOODSON, JJ., dissenting.)

7. ———: ———: **“Right Heirs:” Testator’s Definition of Terms.** Inasmuch as it appears from testator’s will that in one clause of his will he used the terms, “my right heirs” as descriptive of a class different from the “direct heirs, children or grandchildren” of his adopted son, the court will give the same meaning to said words, “right heirs,” whenever used in said will, in the absence of any other definition of them; and therefore plaintiff could not claim title to said realty under said will as a “right heir” of testator.
8. ———: **Acceptance of Benefit: Waiver of Right to Contest: Ancestor and Heir.** One who himself accepts a benefit under a will, as well as one whose ancestor through whom he makes claim, accepts such benefit, waives the right to contest the validity of such will.

Appeal from St. Louis City Circuit Court.—*Hon. William T. Jones, Judge.*

AFFIRMED.

Thomas D. Cannon, David Goldsmith, M. N. Sale, E. P. McCarty and John Burke for appellant.

(1) The will of Louis Bernero should be construed so as to confer testamentary power of disposition upon Theresa Bernero only in case Manuello died before her and left no issue; and in order that the manifest and true intention of the testator may be effectuated the court will supply the words omitted so that the part of said will granting the power of appointment to Theresa Bernero shall read: “If, however, my said wife shall survive said Manuello, and he leave no issue, then she, said Theresa Bernero, is hereby empowered to devise said realty as she shall see fit.” . . . (a) That construction is commanded by the statute. R. S. 1909, sec. 583; *Bryant v. Garrison*, 150 Mo. 667. (b) That construction is sustained by the following direct authorities: 2 *Jarman on Wills* (5 Am. Ed. from 4 Eng. Ed.), pp. 536-

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538; Spalding v. Spalding, 3 Crs. Car. 385; Abbott v. Middleton, 21 Beav. 143; Dulaney v. Dulaney, 79 S. W. 195, 25 Ky. L. R. 1659; Selden v. King, 2 Call, 72; Liston v. Jenkins, 2 W. Va. 62; Young v. Harklrood, 166 Ill. 318; Wheable v. Whithers, 16 Simons, 505; Holmes v. Williams, 1 Root, 332; Den v. Combs, 18 N. J. L. 37; Robards v. Brown, 167 Mo. 457, 460; Nichols v. Boswell, 103 Mo. 160; Gardner on Wills, ch. 13, p. 376; Hellerman's Appeal, 115 Pa. St. 120; Penn. v. Folger, 77 Ill. App. 365; Glover v. Condell, 163 Ill. 566; Dew v. Barnes, 1 Jones Eq. 151; Eatherly v. Eatherly, 1 Caldwell, 461; Wells v. Wells, 279 Mo. 64; Sidney v. Shelly, 19 Ves. 352; Bacon v. Nichols, 105 Pac. 1082; Kellog v. Mix, 37 Conn. 243; Aulick v. Wallace, 12 Bush. 531; Geiger v. Brown, 4 McCord, 418; Sessoms v. Sessoms, Dev. & B. 453; Lynch v. Hill, 6 Munf. 114; Ball v. Phelan, 94 Miss. 293; In re Donges Estate, 103 Wis. 497; Cleland v. Waters, 16 Ga. 496; Baker v. Estate of McLeod, 79 Wis. 534. (2) The construction of the will of Louis Bernero contended for in appellant's first point is required, because the provision of Clause Five of said will giving Theresa Bernero testamentary power of disposition follows a clear, plain and unambiguous devise of the property in question to the issue of Manuello Bernero, and because a devise of that character cannot be cut down or lessened by a subsequent provision not equally as clear, plain and unambiguous. Elsea v. Smith, 273 Mo. 414; Settle v. Schaffer, 229 Mo. 570; Hornbrough v. Craven, 225 S. W. 448; Wells v. Fuchs, 226 Mo. 108; Sevier v. Woodson, 205 Mo. 216; Gannon v. Pauk, 200 Mo. 94; Gannon v. Albright, 183 Mo. 252; Yocum v. Siler, 160 Mo. 289; Chew v. Keller, 100 Mo. 369; Byrnes v. Stillwell, 103 N. Y. 453; Freeman v. Coit, 96 N. Y. 68; Damrell v. Hart, 137 Mass. 220; Mickley's Appeal, 92 Pa. St. 517; Clavering v. Ellison, 3 Drewry, 470; Burton v. Gagnon, 180 Ill. 349; Yocum v. Parker, 134 Fed. 205; Yocum v. Parker, 130 Fed. 722; Doe v. Considine, 6 Wall. 458; Thornhill v. Hall, 2 Clark & Fin. 22; 3 Jarman on Wills (5 Ed.), 704. (a) Indeed, this is declared to be a settled rule of property in

this State. *Cornet v. Cornet*, 248 Mo. 223. (3) The contingent remainder limited by the will of Louis Bernero, deceased, to the children of Manuello Bernero, became a vested remainder in fee, in plaintiff, Louis Bernero, at his birth, and when the prior life estate of Theresa Bernero and the prior life estate of Manuello Bernero were out of the way, plaintiff's vested remainder in fee vested in possession. *Collins v. Whitman*, 222 S. W. 842; *Barkhoefer v. Barkhoefer*, 204 S. W. 909; *Deacon v. Trust Co.*, 271 Mo. 687, 689; *Tindall v. Tindall*, 167 Mo. 218; *Gates v. Seibert*, 157 Mo. 254; *Waddell v. Waddell*, 99 Mo. 338; *Jones v. Waters*, 17 Mo. 587; *Tiedeman on Real Property* (2 Ed.), secs. 412, 413; 2 *Washburn on Real Property* (4 Ed.), 555, 556, 561; *Fearne on Remainders*, p. 217; 10 U. S. Encyc. of Cases, pp. 646, 647; *Manhattan R. E. Co. v. Cudlipps*, 80 N. Y. App. Div. 532; *Moore v. Lyons*, 25 Wend. 119; *Savings Bank v. Lees*, 176 Pa. St. 402; R. S. 1909, sec. 578. (4) Upon the death of Louis Bernero, deceased, a remainder for his own life vested in Manuello Bernero, subject to the preceding particular (life) estate of Theresa Bernero. Manuello Bernero's vested remainder for life was subject to defeat by his death before Theresa; while the remainder for his own life vested in Manuello Bernero upon the death of the testator, Louis Bernero, it did not vest in possession and was defeated by his death. The words "if he shall survive her" by the clear tenets of construction, after words giving Manuello Bernero a vested life estate, have reference only to his enjoyment of the estate—or vesting of possession—and not to the vesting of his title. *Gray on Perpetuities* (2 Ed.), secs. 100, 102, 103, 108; *Johnson v. Loan & Tr. Co.*, 224 U. S. 238; *Williams on Real Prop.* (17 Int. Ed.) 397, 415, 416; 2 *Washburn, Real Prop.* (4 Ed.) pp. 545, 568, 575; 10 U. S. Encyc. of Cases, p. 647; 6 *Albany Law Journal*, 361; *Collins v. Whitman*, 222 S. W. 842; *Warne v. Sorge*, 258 Mo. 171; *Collier v. Archer*, 258 Mo. 389, 390; *Barkhoefer v. Barkhoefer*, 204 S. W. 906; *Deacon v. Trust Co.*, 271 Mo. 687, 689; *Tindall v. Tindall*, 167 Mo. 218; *Byrne v. France*, 131 Mo. 639; *Chew*

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v. Keller, 100 Mo. 362; Byrnes v. Stillwell, 103 N. Y. 453; Temple v. Sammis, 97 N. Y. 526; Embury v. Sheldon, 68 N. Y. 227; Livingston v. Green, 52 N. Y. 118; Johnstone v. Valentine, 4 Sandf. 36; Chew's Appeal, 37 Pa. St. 23; Munderson v. Lukens, 23 Pa. St. 31; Parker v. Röss, 69 N. H. 213; Crosby v. Crosby, 64 N. H. 77; Kennard v. Kennard, 63 N. H. 303; Pue v. Pue, 1 Md. Ch. 382; Gibbons v. Gibbons, 140 Mass. 102; Darling v. Blanchard, 109 Mass. 176; Blanchard v. Blanchard, 1 Allen, 223; Neilson v. Brett, 99 Va. 673; Brockelbank v. Johnson, 20 Beav. 205; Morè v. Lyons, 25 Wend. 119. (5) The death of Manuello Bernero before Theresa Bernero had no other effect upon the title of plaintiff, Louis Bernero, than to remove one preceding life estate, and thus bring his vested remainder in fee one step nearer possession. 1 Fearne, Contg. Rem. 510-517; Scatterwood v. Edge, 1 Salk. 229; Pennington v. Pennington, 70 Md. 418; Ege v. Herring, 108 Md. 391; Johnson v. Harrelson, 6 S. C. 336; Mowatt v. Carrow, 7 Paige, 328; Trust Co. v. Hagen-camp, 191 N. Y. 281; Williams v. Jones, 166 N. Y. 522; Matter of Miller, 161 N. Y. 71; Crozier v. Bray, 120 N. Y. 366; Wager v. Wager, 96 N. Y. 164; McLean v. Freeman, 70 N. Y. 81; Dunning v. Marshall, 23 N. Y. 366; Moris v. Beyea, 13 N. Y. 273; Robinson v. Orphan Asylum, 123 U. S. 702; Mathis v. Hammond, 6 Rich. Eq. 121; Smith v. Hance, 11 N. J. L. 255; Prescott v. Prescott, 7 Metc. 141; 24 Am. & Eng. Ency. (2 Ed.) 411, 453; Statham v. Bell, 1 Cowp. 40; Gibbon v. Gibbon, 40 Ga. 562; Horton v. Barrett, 22 Me. 257; Mebane v. Womac, 2 Jones Eq. 293; Simmons v. Gooding, 5 Ired. Eq. 382; Jones v. Westcomb, 1 Eq. Cas. Abr. 245, par. 10. (6) The provisions of the will of Theresa Bernero are invalid and void because in conflict with the Rule Against Perpetuities: Said provisions of said will of Theresa Bernero violate the rule prohibiting what has been termed a double possibility, and they are therefore invalid, and defendants took no interest in the land described in plaintiff's second amended petition by virtue of said will. (a) The remoteness of an appointment depends upon its

distance from the creation and not from the exercise of the power. *Cox v. Dickson*, 256 Pa. St. 510; *Gray*, Rule Against Perpetuities, 473. (b) It is settled law that a devise or conveyance of land, which entitles the unborn child of an unborn child to take, is invalid. *Whitby v. Mitchell*, L. R. 42 Ch. Div. 494; *Whitby v. Mitchell*, L. R. 44 Ch. Div. 85; *Frost v. Frost*, 43 Ch. Div. 246; *In re Nash*, L. R. Ch. Div. 1910, vol. 1, p. 1; *Lockridge v. Mace*, 109 Mo. 166; *Shepperd v. Fisher*, 206 Mo. 208; *Buxton v. Kroeger*, 219 Mo. 271, 275; *Bradford v. Blossom*, 207 Mo. 233. (c) And this rule applies to equitable estates. *In re Nash*, L. R. Ch. Div. 1910, vol. 1, p. 1; *Gray*, Rule Against Perpetuities (3 Ed.), sec. 69, 245c, 323; *Buxton v. Kroeger*, 219 Mo. 273; *Bradford v. Blossom*, 207 Mo. 233. (d) The fact that no child has been born to Clotilda Longinotti since the death of Theresa Bernero is immaterial. *Buxton v. Kroeger*, 219 Mo. 275; *Shepperd v. Fisher*, 206 Mo. 239; *Rozier v. Graham*, 146 Mo. 360; *Sears v. Russell*, 8 Gray, 98. (7) The court erred in admitting evidence tending to show that Clotilda Longinotti had passed the age when she would no longer bear children. *Rozier v. Graham*, 146 Mo. 360. (8) For the purpose of the rule against perpetuities, a woman is considered capable of child-bearing so long as she lives. *Rozier v. Graham*, 146 Mo. 360; *Flora v. Anderson*, 67 Fed. 182; *In re Dawson*, 39 Ch. Div. 155; *List v. Rodney*, 83 Pa. St. 483.

Albert Arnstein, Jourdan, Rassieur & Pierce, Bryan, Williams & Cave, John J. O'Brien, and John M. Goodwin for respondents.

(1) Plaintiff, the child of Manuello, takes no interest in the realty in question, because Manuello, his father, did not survive Theresa, the wife of Louis. (a) The law is: That where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estate determines, limitations or interests consecutive on that estate are contingent on the same event. 2 *Jarman on Wills* (6 Ed.), p. 1390;

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Oetjen v. Diemmer, 115 Ga. 1005; Simmons v. Gooding, 40 N. C. 382; Clarke v. Johnson, 8 Wall. 493; Bouknight v. Brown, 16 S. C. 155; Brinkerhoff v. Green, 122 N. Y. S. 481; Smith v. Harbinson, 228 Pa. St. 584; Catley v. Vincent, 15 Beav. 198; Mayer v. McCracken, 245 Ill. 584; Miller v. Chapman, 24 L. J. Ch. 412. (b) The use of the words: "If he shall survive her" after the granting of Manuello's life estate in the first clause must relate to the other limitations, because it is of no use or value as only applied to Manuello's state. Armour v. Frey, 226 Mo. 646, 674. (2) The court in this case ought not to supply or interpolate into the will of Louis Bernero the words suggested by the appellant. (a) It is elementary that a court will not interpolate words in a will unless there is enough expressed in the will to show that the testator intended the disposition to be made which the supplied words will accomplish. Robinson v. Crutcher, 209 S. W. 104; Nolan v. Nolan, 154 N. Y. S. 355; Smith v. Trust Co., 105 Atl. 534; Jordan v. Jordan, 281 Ill. 421; Bender v. Bender, 226 Pa. 607; Matteson v. Brown, 33 R. I. 339; Clark v. Rathbone, 221 Mass. 574; Child v. Child, 185 Mass. 376; Maguire v. Maguire, 110 La. 279; Graham v. Graham, 23 W. Va. 36; Boston S. Dep. Co. v. Buffum, 186 Mass. 242; Todd v. Tarbell, 187 Mass. 480; Neal v. Hamilton Co., 70 W. Va. 250. (b) It must plainly appear with absolute certainty that the particular words claimed to be omitted were in fact omitted. Smith v. Trust Co., 105 Atl. 534. (c) In the interpretation of a will the court cannot indulge in a conjecture as to the supposed intention of the testator or add words to his will to express an intention which is not plain and unmistakable. Jordan v. Jordan, 281 Ill. 421. (d) Courts cannot determine by conjecture that a testator has left out words in his will and undertake to rectify such omission. Matteson v. Brown, 33 R. I. 389. (e) A court cannot supply words in a will to give effect to an intention which the testator has not expressed by the words used by him. Child v. Child, 185 Mass. 376. (f) Missing words can be supplied by the court only when the words used by the testator show by

necessary implication what the missing words are. *Boston S. Dep. Co. v. Buffum*, 186 Mass. 242; *Child v. Child*, 70 N. E. 464. (g) When a testator in the disposition of his property overlooks the particular event or matter which, had it occurred to him, he would probably have corrected against, a court will not employ or insert the necessary clause for the purpose of supplying the omission. *Neal v. Hamilton Co.*, 70 W. Va. 250. (h) Although the inference or intention be more or less strong, yet if not necessary or indubitable, the court will not aid the supposed intention by adding or supplying words. *Graham v. Graham*, 23 W. Va. 36. (3) None of the authorities cited by counsel for appellant are controlling in this case. (a) In the construction of wills adjudicated cases of this or other courts in construing the will of some other person carries no great weight, especially if the words and tenor of the whole will are not absolutely indetical. Page on Wills, sec. 354; 1 Schouler on Wills (5 Ed.), p. 583, sec. 463; *Clark v. Boorman*, 18 Wall, 493; *In re Collier's Will*, 40 Mo. 321; *Chew v. Keller*, 100 Mo. 373; *Preston v. Brant*, 96 Mo. 556; *Smith v. Bell*, 6 Peters, 68; *Armour v. Frey*, 226 Mo. 665. (b) When all of the authorities cited by appellant in support of his proposition to interpolate words in the Bernero will are considered, it will be found that none of them are in any wise similar to the cause at bar. (4) There is no conflict in the provisions of Item 5 of the will of Louis Bernero and the plaintiff is not given an absolute fee in this property upon his birth in clear and decisive terms. *Gibson v. Gibson*, 239 Mo. 490; *Cox v. Jones*, 229 Mo. 67. (5) The proposition that a clear decisive gift to one in fee cannot be cut down by subsequent language in a will unless such language is equally clear and decisive, has no application in this case. (a) It is the duty of the court to construe the will of Louis Bernero so that every provision thereof will stand and be effective. *Gibson v. Gibson*, 239 Mo. 490; *Freeman v. Maxwell*, 262 Mo. 13; *Snyder v. Kloepple*, 270 Mo. 389. (b) It is a necessary corollary of the rule that a clear, distinct devise

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may not be cut down by subsequent ambiguous and uncertain words, that subsequent clear and distinct language must be given effect. *Middleton v. Dudding*, 183 S. W. 443. (6) When a testator provides in his will that the title to property shall vest at a particular time, this language is binding upon the court and it cannot be held that he intended a vesting at some other period, other than is set forth. (a) There is no clear and decisive gift in the plaintiff as claimed. (b) The language of the will creating a power of appointment in Mrs. Bernero, if she survive Manuello is most clear and distinct; in fact, it is the most distinctive and assertive portion of the will. (c) It is the duty of the court to so construe the first clause of the Louis Bernero will as not to make a conflict with the second clause creating the power of appointment and occasion the necessity of interpolating words. (7) The plaintiff cannot claim that the will of Theresa Bernero violates the rule against perpetuities or any alleged rule that the gift to an unborn child of an unborn child is void. (a) By his pleadings the plaintiff has made no claim to any interest in this real estate as the right heir of Louis Bernero and he is bound by his pleadings. *Brandt v. Bente*, 177 S. W. 377; *Wimpey v. Lawrence*, 208 S. W. 54; *Development Co. v. Barnes*, 216 S. W. 735; *Inv. Co. v. Gallagher*, 188 S. W. 151; *Noble v. Cates*, 230 Mo. 189. (b) Plaintiff is not a right heir of Louis Bernero within the meaning of the provisions of Item 5 of his will. *Reinders v. Koppelman*, 94 Mo. 338; *Clarkson v. Hatton*, 143 Mo. 47; *Hockaday v. Lynn*, 200 Mo. 456; Note in 5 A. S. R. 1280. (c) Plaintiff cannot claim through Augustino Bernero as a right heir, because Augustino elected to accept and did accept a legacy under the provisions of the will of Theresa Bernero. *Albert v. Albert*, 68 Md. 352; *Graham v. Whitridge*, 57 Atl. 609; *Paulus v. Besch*, 127 Mo. App. 255; *Fox v. Windes*, 127 Mo. 502; *Keene v. Barnes*, 29 Mo. 377; *Stone v. Cook*, 179 Mo. 546; *O'Reilly v. Nicholson*, 45 Mo. 161; *Young v. Biehl*, 77 N. E. 406; *Sorenson v. Carey*, 104 N. W. 958; *Werner's Administration*, sec. 461, p.

1016; Pemberton v. Pemberton, 29 Mo. 408. (d) Therefore, even if it be assumed that plaintiff has, by his pleadings, properly presented a claim as a right heir to any interest in this real estate, yet by reason of the foregoing he must fail in such a claim, and having no interest in the controversy and being unable to profit thereby, he cannot be heard to assert any such right, even though her will were invalid. Barkley v. Donnelly, 112 Mo. 561; 40 Cyc. 1847, sec. 3; State ex rel. v. McQuillan, 246 Mo. 674. (8) The question of whether the will of Theresa Bernero in creating the trust in question violates the rule against perpetuities is out of this case. (9) Plaintiff cannot urge upon the consideration of this court that the will of Theresa Bernero is void in the exercise of this power because it is possible thereunder for the child of an unborn child to take an interest in the income and *corpus* of the trust. (a) Not having made any such claim by his pleadings and not having presented any such question to the lower court, the plaintiff cannot be heard here upon such a contention. Buxton v. Kroeger, 219 Mo. 224; Noble v. Cates, 230 Mo. 189; Brandt v. Bente, 177 S. W. 377; Wimpey v. Lawrence, 208 S. W. 54; Inv. Co. v. Gallagher, 188 S. W. 151. (b) The only cases in this country that can be found which have passed upon the proposition whether or not a gift to the child of an unborn child is void, irrespective of when it vests, decided that question against the plaintiff. Brown v. Brown, 86 Tenn. 277; Lorrillard v. Coster, 5 Paige, 172. (10) Plaintiff not having shown any title in himself and the undisputed evidence showing that defendants were in possession, the decree should be affirmed, because mere possession in the defendants as against plaintiff who has no title is sufficient. Wilden v. St. Paul, 12 Minn. 192; Ford v. Belmont, 69 N. Y. 567; Child v. Morgan, 51 Minn. 116; Knight v. Alexander, 38 Minn. 384; Steele v. Fish, 2 Minn. 153; Mitchell v. Trowbridge, 47 Colo. 6; Currier v. Thompson, 70 Vt. 250; McGovern v. Mowery, 91 Cal. 383. (11) On appeal in an equity case or a case tried by a court without a jury errors in the admission of testimony

will not be regarded. The court can reject, consider, weigh and decide on the competent proof. *Hanson v. Neal*, 215 Mo. 256; *Donaldson v. Donaldson*, 249 Mo. 228; *Home Tel. Co. v. Carthage*, 236 Mo. 644. (12) A decree in a quiet title action only settles matters to the date of the rendition thereof and then only between the parties and their privies who are parties to the record. 32 Cyc. 1384, sec. b; *Stone Co. v. Oman*, 134 Fed. 441. (13) In a quiet title action this court will only concern itself with the present rights of the immediate parties before it. It will leave the rights of unborn persons and matters to be determined by future events to a future date. *Young v. Hyde*, 255 Mo. 510.

DAVID E. BLAIR, J.—The record in this case on appeal was lodged in Division One of this court and on assignment fell to one of the commissioners of that division. His opinion reversing and remanding the judgment of the trial court was not adopted as the opinion of Division One and the cause was transferred to Court in Banc and has been here argued and submitted. We adopt *in toto* the statement of facts and contentions of the parties made by the learned commissioner in his opinion, which is as follows:

I. "Appeal from the Circuit Court of the City of St. Louis. Suit to quiet title. This case involves the construction of the will of Louis Bernero, who died in St. Louis on August 8, 1904. Plaintiff claims title under said will, but lost in the lower court. Said Louis Bernero left surviving him his widow, Theresa Bernero, also Manuello Bernero (the father of plaintiff), whom the testator refers to in his will as his adopted son. They had no children of their own. At one time he was engaged in the wholesale cigar business in St. Louis with his brothers Joseph and Augustino, who, however, returned to their native country, Italy. This was prior to 1880. In 1880 Louis Bernero and his wife visited his brother Augustino in Italy. Augustino was married at the time and had a large family of children, amongst others the

said Manuello, who was then about three years of age. By agreement with his parents, Louis Bernero agreed to take said Manuello back to the United States with him and raise and educate him as his own child—in effect, to adopt him. In pursuance of his agreement, he and his wife returned to St. Louis, taking Manuello with them. They raised, educated and treated him as their son and he lived with them until the death of Louis Bernero in 1904. Manuello was then about twenty-seven years old and single. The relations between him and the testator seem always to have been amicable and affectionate. Manuello and the widow were made executors of his will without bond. The two brothers of Louis Bernero also survive him. On November 30, 1904, after the death of said Louis, Manuello married Lorraine Thompson, the mother of the infant plaintiff, Louis Bernero, and the curatrix of his estate. Shortly after the death of Louis Bernero the elder, his widow Theresa, by a written document dated April 10, 1905, formally adopted said Manuello as her child. This document recited his parol adoption by Louis Bernero and his wife in 1880. Manuello Bernero died April 4, 1910, leaving the infant plaintiff Louis, then about four or five years of age, as his only child and his widow Lorraine him surviving. On July 15, 1911, a little over a year after Manuello died said Theresa departed this life, leaving a will dated June 25, 1910.

“At the time of his death and when he made his will, the property of said Louis Bernero, consisting mostly of real estate, but some \$30,000 or \$40,000 in money, was probably worth \$400,000 or \$500,000. It was all in the City of St. Louis. The property involved in this controversy is a piece of business property in Block 172 of said city, at the southwest corner of Washington Avenue and Ninth Street and is particularly described in paragraph five of the will of said Louis Bernero. At the time aforesaid said property in question here was worth some \$200,000 and constituted about one-half in value of his estate, or about as much in value as was given

to the widow absolutely by his will. When said Theresa Bernero died her property consisted, so far as shown by the record, of the property she had received from her husband's estate. She left surviving her besides the plaintiff, the child, and Lorraine Bernero, the widow of her adopted son Manuello, her sister Clotilda Longinotti and the eleven children of her said sister mentioned in her will and who, with the defendant trust company, are the defendants in this case. Said Clotilda with her family had for many years lived in the State of Arkansas. There was also a niece, the daughter of a brother mentioned in her will.

"By his will Louis Bernero first made certain specific bequests to charity aggregating \$1200. He next devised to his brother Joseph a lot at the northwest corner of Ninth and Morgan Streets in St. Louis, which is not treated by the parties as of great value. The remaining portions of his will are as follows:

"5. I give and devise unto my beloved wife, Theresa Bernero, the realty owned by me in block number one hundred and seventy-two (172) of said City of St. Louis, at the southwest corner of Washington Avenue and Ninth Street, having a frontage of forty-nine (49) feet six (6) inches, more or less, on the south line of Washington Avenue, by a depth southwardly along the west line of Ninth Street to the north line of St. Charles Street, and bounded west by property now or late of the Tutt estate: to have and enjoy for and during the term of her natural life, and at the time of her death the same to pass to our adopted son, Manuello Bernero, if he shall survive her, to have and enjoy during his natural life, and at his decease to pass to and vest in fee in his children if any he have, or their descendants, but in default or failure of such direct heirs, children or grandchildren him surviving, then at the time of his death the title to said realty in fee shall pass to and vest in my right heirs; if, however, my said wife shall survive said Manuello, then she, said Theresa Bernero is hereby empowered to devise said realty as she shall see fit, or if she shall fail to make such testa-

mentary disposition of same, then said realty, upon her death, shall vest in my right heirs, if she shall survive said Manuello; I authorize and empower my said wife during her lifetime, and if said Manuello shall survive her and enter upon the enjoyment of said realty, then said Manuello during his lifetime, to lease said realty thus bequeathed to them for life as aforesaid, successively, on such terms as they severally deem proper, each exercising such right during her or his life-tenancy, for leasehold periods not exceeding twenty-five (25) years each.

"6. I give and bequeath unto our faithful domestic, Louisa Gazzolo, the sum of Five Hundred Dollars.

"7. All the rest, residue and remainder of my estate, real and personal, wheresoever and whatsoever, I give and devise unto my beloved wife as her absolute estate, free from conditions or restrictions.

"8. I nominate and appoint my said wife and said Manuello Bernero executors of this my last will and testament, and in the event of the death of either before my own decease, then I constitute the survivor sole executor hereof; I desire and direct that no bond be required from them, or either of them for the due administration of my estate, and I further empower and authorize them, or the survivor of them, as such executors or sole executor to sell and dispose of any of my realty, excepting said parcels situated in blocks numbers one hundred and seventy-two (172) and one hundred and seventy-five (175), specifically devised as hereinabove set forth.

"IN TESTIMONY WHEREOF, I have hereunto set my hand at said City of St. Louis, this nineteenth day of May, A. D. 1900.

" 'LOUIS BERNERO.' "

"Augustino Bernero, the brother of the deceased husband of said Theresa and the father of Manuello, with several other sons and daughters, survived the said Theresa. By her will she bequeathed to said Augustino the sum of \$2000, and to each of his sons and daughters, the same amount, aggregating in all \$16,000. She also made several charitable bequests aggregating \$2,500. By her will she

bequeathed to the plaintiff Louis Bernero (or to a trustee for him) the sum of \$10,000. The will of said Theresa gave her niece, the daughter of a brother, \$3000 and to a former servant, \$200. Her said will also contained a provision, that if any of the beneficiaries should either directly or indirectly contest her will, or attempt to have it set aside, or its provisions defeated, such beneficiary should take nothing under her will, but the bequest made in his or her favor should be annulled. By the eleventh clause of her will said Theresa devised the property in question to the defendant trust company in trust for the eleven children of her sister Clotilda, on certain terms and conditions. This was followed by a residuary clause, giving her said sister Clotilda the residue of her estate.

"Prior to this suit, the plaintiff, by next friend, instituted a suit to contest the will of said Theresa in which final judgment was rendered sustaining said will. No appeal was taken.

"In the case at bar the lower court found and decreed that plaintiff had no interest in the property sued for, but that it belonged to defendants, the children of said Clotilda Longinotti, and their trustee, defendant trust company, under will of Louis Bernero and of Theresa his widow.

"The lower court filed a written memorandum of its opinion which, so far as regards the construction of the will of said Louis Bernero, is as follows:

" 'I can see nothing to be accomplished by filing an extended memorandum in connection with my decision in this case.

" 'After careful consideration of the arguments of counsel in the case of those portions of the briefs filed that appeared to me at all relevant to the issues raised, my mind is not left in any doubt but that under the construction that must be placed on the language of this will, the plaintiff has no interest or estate in the property in question.

" 'Plaintiff's counsel begin with the proposition that there is an apparent inconsistency arising from the language of the will. There is an inconsistency only if

the first part of the paragraph in question is construed as plaintiff would have it construed. Taking this clause by itself the construction plaintiff contends for is a forced construction, albeit one that might be resorted to, if necessary, to harmonize it with other provisions in the will. The other clauses of this paragraph are plain, exceedingly plain. No authority is cited, or can be cited, justifying the placing of a forced construction on one provision of a will, or other instrument for the purpose of creating an inconsistency. Consider what the result of the adoption of such a principle would be. A will could hardly be drawn without some clause in it susceptible of different constructions. Disregarding the intent of the testator as disclosed by other provisions of the will, a construction would be placed on it out of harmony with the other provisions. Then the court would have to resort to interpolations or forced constructions of such other provisions to avoid inconsistencies, with the result that the effect given to the will would be very different from the intent of the testator.

“ ‘It is to avoid any such result that the courts take as one of the fundamental rules in construing wills that the whole instrument, including all its provisions and the general scheme of the testator as disclosed thereby, must be considered in construing each and every provision thereof.

“ ‘Applying this rule to the will in question, it is apparent to me that the remainder to the children or descendants of Manuello Bernero was made conditional upon Manuello surviving his mother—that is, upon his being alive at the time of her death.

“ ‘The suggestions of plaintiff’s counsel—ingenious as they are, and plausibly presented—have not raised a doubt in my mind as to the effect of the language of this clause of the will.’

“Moving for a new trial without avail, the plaintiff appealed to this court.

II. “Appellant’s learned counsel contended below and contend here, that by the fifth clause of the will of Louis

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Bernero, the plaintiff, as the only child of Manuello Bernero, the adopted son of said Louis, the said Manuello and Theresa, the widow of said Louis Bernero being dead, was the owner in fee simple and also entitled to the possession of the property in dispute. That the whole will of said Louis Bernero, viewed in the light of his circumstances and family connections at the time he wrote his will, satisfactorily shows an intention to make the plaintiff the owner of the fee in said property upon the expiration of the successive life estates given to his father and adoptive grandmother by said fifth clause. That to carry out such intention thus ascertained the court must, if necessary, interpolate or imply the words, 'and he leaving no children,' or 'and he leaving no issue,' after the word 'Manuello' in the first and last parts of the provision of the said fifth clause giving the widow power of appointment concerning said property. Otherwise, said fifth clause would be repugnant to itself and defeat the intent of the testator, as shown by the whole of said clause and will, which was to devise said property to the children of said Manuello at his death, if any he should have, without regard to whether he survived the testator's widow or she survived him."

III. "The respondents' learned counsel say, there is no repugnancy between the prior language giving the children their estate and the latter provision giving the widow the power of appointment. That by virtue of the prior language the children of Manuello were only to receive an estate on the contingency that their father survived his fostermother, which did not happen. That this is too plainly and repeatedly written in the will to be gainsaid and is clearly the true intent and meaning of the testator, as shown by the whole and every part of the will and surrounding circumstances. That the perfectly clear language of the last provisions giving them nothing, but giving the widow the power of appointment in the event she survived their father, is in harmony with and

**Contentions
of Appellant.**

**Contentions
of Respondents.**

not repugnant to the language of the prior gift to the children and makes clear any uncertainty as to the testator's intent in such prior language to give said children the estate only upon the condition and contingency that their father survived his foster-mother. Hence, plaintiff has no interest in the property in question."

IV. The learned Commissioner then proceeded in his opinion to state many reasons why the will of the testator Louis Bernero should be construed as contended for by appellant, and came to the conclusion that the interest of the child Manuello was not contingent on Manuello surviving Theresa, but became a vested remainder which could not be defeated by the subsequent provision in paragraph five of testator's will, giving Theresa power of testamentary disposition of the property in case she survived Manuello. With this conclusion the majority of the judges are not in accord.

Construing Wills:
Interpolating Words.

Appellant's counsel count much on the English case of *Abbott v. Middleton*, reported in 21 Beavan, 143, as decided by the Master of Rolls, and in 7 House of Lords Cases, 68, as decided on appeal. The will in that case provided for an annuity of two thousand pounds to testator's wife, made provision for a daughter and grandchildren and made the son residuary legatee and provided that on the death of the widow the sums provided for her annuity should become the property of the son during his life, and then the principal sum to go to his children, "but in case of my son dying before his mother, then, and in that case, the principal sum to be divided between the children of my daughters, the deceased Jane Ricketts and Mary Paxton, and of my now surviving daughter, Eliza Middleton (should she leave any issue), in equal portions to each.'"

The Master of Rolls, at page 149, said:

"In my opinion, the two clauses of this sentence, as they stand, are inconsistent and repugnant. The first branch gives an estate to the children, the second

takes it away, and the introduction of the words 'without leaving a child' after the word 'dying,' in the second branch of the sentence, would, in my opinion, make the two branches of the sentence uniform and consistent."

When the case came before the House of Lords on appeal, the Lord Chancellor at page 83, said:

"That where there is a clear gift, it can only be altered and retracted by the most plain and unambiguous and unequivocal words, and the court will, *in dubio*, justly prefer that construction of any subsequent clause which will make it consistent with the intention plainly expressed in the preceding part. . . .

"Here there is, first, a plain and unequivocal gift, and then there are words immediately following which at once produce an inconsistency, and therefore an ambiguity in the dispositions of the will.' "

Lord St. Leonards, concurring, at page 92, said:

"You are not at liberty to transpose, to add, to subtract, to substitute one word for another, or to take a confined expression and enlarge it, without absolute necessity. You must find an intention upon the face of the will to authorize you to do so. . . .

"And we must stop there with this observation, that the property is actually given without any doubt or ambiguity to the son's children, so that if it is to be taken away from the children we must find clear words to effect that object."

The interpolation of words in the Abbott case was sustained on the ground that there was a clear gift to the son and his children and the subsequent provision was repugnant to that gift and tended to cut it down. It may be noted in passing that Lord St. Leonards at the outset admonished their Lordships "that 'hard cases make bad laws,' and I, therefore, made a covenant with myself to guard myself as much as I could and to keep within what I consider to be the strict rules of law applicable to a case of this kind." Both the Lord Chancellor and Lord St. Leonards expressed themselves as having no moral doubt as to the testator's intention.

Appellant cites *Nichols v. Boswell*, 103 Mo. 151, l. c. 158, wherein *MACFARLANE, J.*, quoting from a New York case, said:

“Where one estate is given in one part of an instrument in clear and decisive terms, such estate cannot be taken away, or cut down, by raising a doubt upon the extent, or meaning, or application of a subsequent clause, or by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that estate.”

In that case this court interpolated in a will the words “undisposed of” to carry out the intention of the testator. The use of such words was employed only because the court found there had been a devise in “clear and decisive terms,” which could not be defeated by subsequent words less clear and decisive.

So in *Briant v. Garrison*, 150 Mo. 655, the word “through” was substituted for “between” to prevent the defeat of the “manifest intention” of the testator. In *McMahan v. Hubbard*, 217 Mo. 624, words were supplied so “that the instrument may not perish and the manifest intent of the parties be not defeated by the palpable error of the scrivener.” In *Den, Nelson et ux. v. Combs*, 18 N. J. L. 27, the words “under age and without lawful issue” were supplied to effectuate the evident intention of the testator and to prevent the defeat of the clear and definite devise made in the will. In *Young v. Harkleroad*, 166 Ill. 318, the words “without such heirs” were interpolated in the will there under consideration. Referring to the words used in the will it was said: “The remaining portion of the sentence (quoting) taken literally, directly contradicts what has just been said.”

In *Baker v. Estate of McLeod*, 79 Wis. 534, the words “and left no issue” were supplied by the court where the evident intent of the testator was to guard sacredly the interests of his motherless child. The words used in the will would have cast the estate upon a stranger, rather than the child of the daughter where she

died without having attained the age of twenty-one. The court, at page 545, said:

"We fully agree with the statement of Mr. Justice ANDREWS that 'it may be safely assumed that, where a will is dictated under the influence of family relations, it would seldom happen that a testator would intentionally cut off the issue of a son or daughter from taking the share of the parent in his estate for the benefit of collateral objects.' "

In the very late case of *Thornbrough v. Craven*, 225 S. W. 445, decided November 20, 1920, and not yet officially reported, this court En Banc had before it for construction a will wherein the testator in one clause unconditionally devised his land to his widow and in a subsequent clause directed that the undisposed portion of his estate (at the death of his widow) should be divided among testator's brothers and sisters. In a contest over the land between the brothers and sisters of the testator and the collateral heirs of the testator's widow this court held that the heirs of the widow took the land under the rule that the prior clear and decisive grant could not be defeated or cut down by subsequent repugnant provisions in the will of vague and general character.

Numerous cases are cited by appellant which we have carefully examined. In an opinion of any reasonable length it is impossible even to refer to them. To discuss fully the cases cited by counsel on both sides would extend this opinion to the dimensions of a treatise. It will be found that in all these cases, as in the ones we have referred to, the facts were that in the wills under consideration either a clear and definite provision was followed by a repugnant or inconsistent provision, not equally clear and definite, tending to defeat or cut down the prior one, or the provision sought to be sustained by the actual words used was against the manifest intention of the testator, as gathered from the entire instrument, or the exact wording, of vague and uncertain meaning, would have resulted in a disposition of the property

devised utterly at variance with the natural instincts of the testator, such as the defeat of succession in title in the heirs of a favorite child of testator for the benefit of strangers. In no case which we have examined, where the meaning of the testator has been clearly and distinctly expressed in plain and unequivocal language, have the courts undertaken to supply or interpolate words not used by testator, however much the testator's disposition of his estate may have appealed to the court as hard and unnatural.

All this court can do, after an examination of said cases, is to turn back to the will before us and carefully examine all of its provisions. Probably no will ever drawn was exactly like the one before us, and cited authorities are persuasive only and not controlling, because of different states of fact. As one learned judge has expressed it, "no will has a twin brother." We must therefore study the provisions of Louis Bernero's will, guided by the general principles laid down by the courts and textwriters and in the light of the circumstances surrounding its execution, and all the time with the very highest regard for and closest attention to the language he employed.

The Legislature has laid down a fixed rule for our guidance in construing wills. Section 583, R. S. 1909 (Sec. 555, R. S. 1919), is as follows:

"All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them."

The statute is only declaratory of well settled rules for construing wills laid down by the courts and expresses the common sense of the matter.

To give the will before us the meaning contended for by appellant, words not used by testator must be interpolated by us. The use of such words should never be resorted to except when clearly necessary to carry out the true intention of the testator and this intention must be gathered from the will itself and the whole of it

**Testator's
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Controls.**

and not because the disposition of his estate made by testator appears to the court to be an unreasonable, unnatural or harsh one. We quote with approval the language of respondents' counsel in their brief and argument:

"The grave danger lies in the likelihood of making a new will for the testator thereby instead of construing the language the testator has used. From an examination of a large number of authorities it may be laid down as a general proposition that the will on its face must show some contradiction or repugnancy, or that it is incomplete. It must then further appear *from the face of the will itself* that the testator has inadvertently or unconsciously omitted certain words or language which are necessary to make his intention clear. It must next appear from the face of the will *what words or language have been omitted*. It must also appear from the face of the will that the testator *clearly intended to make a disposition which the supplied words will effectuate*."

Appellant's fundamental error is in his assumption that Louis Bernero in one part of his will made an unconditional provision for the children of Manuello and then proceeded to provide for a contingency, to-wit, if Manuello should predecease Theresa, upon the im-
probable happening of which, that vested in-
Will terest should be defeated. It is his contention
Construed. that Manuello's children took a vested remainder in the property, independent of Manuello surviving Theresa. The will is not fairly susceptible of such construction. In our opinion, in the plain, ordinary sense of the words used by testator, not only the life estate of Manuello, but also the remainder provided for in his children, were contingent upon Manuello surviving Theresa.

After providing for a life estate in Theresa the will made the following provision with reference to the premises in controversy: *First*, if Manuello survive Theresa (a) life estate to Manuello (with power to execute twenty-five year lease); (b) the remainder in fee to Manuello's children; (c) if no children, then

remainder to the right heirs of testator. *Second*, if Manuello does not survive Theresa, (a) right in Theresa to dispose of the property by will as she saw fit; (b) failure of Theresa to make such will, remainder to the right heirs of testator. Thus construed the will made provision for remainder in fee in the children of Manuello *only on the contingency that Manuello survived Theresa*. That contingency never having happened, the remainder never vested in Manuello's children. This construction gives meaning to all the words used by testator and it makes it unnecessary that words be supplied or interpolated. It gives full consideration to the whole will and indicates an intention of the testator entirely different from that contended for by appellant. It results in the conclusion that not only the life estate in Manuello, but the dependent remainder in his child, are entirely contingent on Manuello surviving Theresa. This construction is supported by the general rule laid down in 2 Jarman on Wills, (6 Ed.) 1390-91:

"When a contingent particular estate is followed by other limitations, a question frequently arises, whether the contingency affects such estate only, or extends to the whole series. The rule in these cases seems to be, that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and therefore appear not reasonably applied to the ulterior limitations.

"Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event, for want of something in the will to authorize a distinction between them."

It was not unnatural for testator, in the event Manuello died first, to empower his wife, the companion of his

productive years, the sharer of the toil and economy of those years, and the partner in his prosperity, his confidante and adviser and whose devotion and fidelity he had no reason to question, to make final disposition of his estate after she was through with it. The wisdom of his decision to rely on her judgment to make a disposition of the remainder of his estate in the way that appeared to her as the wisest and most beneficent in view of the then existing circumstances, cannot be questioned by us. When testator died Manuello had not even married and he knew nothing of the character or disposition of the future mother of Manuello's children. It was entirely reasonable to suppose that testator intended to provide for just the contingency that eventually did happen, to-wit, that with Manuello dead, testator's widow might think it unwise to devise the property to appellant.

It is not the province of this court to rewrite the wills of testators in order to make them conform to our notions of the proprieties and equities of the situation. The objects of the bounty of a competent testator, after observing certain restrictions due to the marriage relation, are entirely within the discretion, even caprice, of the testator himself. It will not do for us to construe Louis Bernero's will in the light of Theresa's subsequent testamentary disposition or to say such disposition was contrary to the disposition the testator would have made had he been alive and in control of the estate at the date of Theresa's will. It is enough that she had the power. Had Theresa made no testamentary disposition whatever of the estate, it would have availed appellant nothing since his interest in expectancy as a child of Manuello never became vested.

V. Appellant contends that the will of Theresa Bernero is invalid under the rule against perpetuities.

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Testator's Definition
of Words Controls.**

As we understand paragraph five this question can only be raised by a right heir of testator Louis Bernero. If appellant is not a right heir of such

testator, within the meaning of his will, he is not in a position to urge such alleged invalidity.

Respondents insist that the case was tried below on the theory that appellant claimed as a child of Manuello Bernero and that he cannot now be heard to say that he has some right, title or interest in the property here involved as a right heir. It must not be forgotten that appellant's petition asks that the title to the property be quieted as to respondents and that respondents have asked similar relief as against appellant. We think the court is therefore required to pass on all questions affecting the title to the property as between the parties. It is true appellant bases his claim to the property primarily on his status as a child of Manuello claiming title vested in him by virtue of the first clause of paragraph five of the will. This claim we have disallowed. If appellant can claim as a right heir, it must be under the second clause of paragraph five. That clause reads "if, however, my said wife shall survive said Manuello, then she, said Theresa Bernero is hereby empowered to devise said realty as she shall see fit, or if she shall fail to make such testamentary disposition of same, then said realty, upon her death, shall vest in my right heirs, if she shall survive said Manuello."

If we assume for the sake of the argument that the will Theresa made is invalid because violative of the rule against perpetuities, then the same situation exists as if she had failed to make testamentary disposition of the realty. In that event, Theresa being dead, the title vested in the right heirs of Louis Bernero.

We are convinced that appellant is not a right heir of Louis Bernero, the testator, within the meaning of the will. Testator has defined the term "right heirs" for us. Regardless of the meaning of that term in ordinary usage, appellant is expressly excluded by the very wording of the will. The line of succession in the title fixed by the testator under clause one of paragraph five is as follows: First, Manuello for life, if he survive Theresa; second, the children of Manuello, if any he have,

or their descendants, "but in default or failure of such direct heirs, children or grandchildren him surviving, then at the time of his death the title to said realty in fee shall pass to and vest in my right heirs." The existence of children of Manuello at his death precluded any interest in the right heirs of testator and the use of the term "right heirs" in that connection clearly shows that appellant is not a right heir as that term was used by testator. Testator uses the words "right heirs" in the same sense in the second clause of paragraph five. Once having defined the term, the courts will give it the same meaning whenever used in the same instrument, unless it has been subsequently defined otherwise.

Appellant has taken the position in his brief that the term "right heirs" means the same thing in both instances where it is used by testator. We quote from the foot of page 42 of appellant's statement, brief and argument, as follows:

"There is a repugnancy between the provisions of the foregoing devise as written. . . . On the other hand the first part vests the title in the right heirs of the testator *only* if Manuello leaves no issue surviving him, while the second part vests the title in the right heirs, whether Manuello leaves issue or not."

Clearly no repugnancy could exist on that account, unless the words were used in the same sense in both cases. We are further supported in this view by appellant's counsel. We quote from page 7 of appellant's Reply to Argument of the Guardian *ad litem* of Corinne Goodwin, et al., as follows:

"It clearly appears by this provision that the *Right Heirs* meant by the testator were the testator's collateral heirs, and not the descendants of Manuello, and that the testator intended to classify the '*Right Heirs*' by themselves; of course, the '*Right Heirs*,' meant by the testator in the second part of Clause 5, of his will, were the same class, or '*Right Heirs*,' referred to in the first part.

But it may be said that Augustino Bernero, the natural father of Manuello, is a right heir of Louis Bernero

and that appellant may have some interest or title on that account. Sufficient answer to such contention is found in the fact appearing of record that Augustino Bernero accepted a bequest under the will of Theresa Bernero and elected to take thereunder and thereby accepted the terms thereof and for himself and his heirs thereby forever waived any claim against the validity of Theresa's will. [Wood v. Conqueror Trust Co., 265 Mo. 511.]

Appellant is not entitled to claim as a right heir of Louis Bernero and is not in a position in this case to question the validity of Theresa's will. As to him it is a valid will whether it violates the rule against perpetuities or not. This makes an examination of the question of the validity of her will unnecessary. As against appellant, respondents were entitled to have their title quieted.

Finding no error in the record we conclude that the judgment of the trial court should be affirmed. It is so ordered. All concur except *Higbee, J.*, who dissents in separate opinion, and *Woodson, J.*, who dissents and concurs in separate dissenting opinion of *Higbee, J.*

HIGBEE, J. (dissenting).—In the year 1880, Louis Bernero and his wife, Theresa, who were childless, went to Italy to visit his two brothers. He induced his brother, Augustino, who had eleven children, to let him have the youngest child, Manuello, three years of age, whom he and his wife agreed to adopt and bring up as their own child. After the death of Louis Bernero in 1904, the widow consulted an attorney who advised her to execute a deed of adoption. Mrs. Bernero insisted that there was no need of that because Manuello was the son of Louis, that Louis had adopted him in the old country. The attorney advised that as
Statement.

there was no record of the adoption here she had better have the deed. She accordingly executed a deed adopting Manuello as her son, which recited that she and her husband, Louis Bernero, adopted him in Italy in 1880 when he was three years of age, and brought him to their home in St. Louis; that he has ever since been educated and supported by them and lived with them as their legally adopted son and been so recognized by them, and has done

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and performed all the duties of a child. This deed, executed in proper form April 10, 1905, was duly signed, acknowledged and sworn to by Theresa and Manuello, and recorded.

Every circumstance in the case indicates that Louis and Theresa Bernero received this child from his parents on a sacred trust, with feelings akin to the emotions that stirred the soul of Jochebed, the "Hebrew nurse," when she received from the Egyptian princess her own child with the injunction, "Take this child away and nurse it for me and I will give thee thy wages. And the woman took the child and nursed it."

The record shows that Louis Bernero loved Manuello as his own son. One of Bernero's intimate acquaintances testified: "One time I talked to him; Mr. Bernero, what are you going to do when you got lots of money? You give some to Vincent and David and Tony Bernero (brothers of Manuello)? He says, No, I got Mannie; he is my son." Mr. Ghio, formerly a partner of Louis Bernero, testified: "About Manuello, he (Bernero) told me when he got hurt one time; he got kicked in the baseball or football, I believe. He said my son got kicked yesterday and I guess he is going to die, and he was crying; yes, sir." It seems that Manuello's death was the result of this injury.

I. The contention in this case is over the construction of paragraph 5 of the will. It disposed of real estate now estimated to be of the value of nearly \$500,000. This paragraph falls naturally into two clauses. Clause 1 reads:

"I give and devise unto my beloved wife, (description) to have and enjoy for and during the term of her natural life, and at the time of her death the

Will:	the same to pass to our adopted son, Manuello
Testator's	Bernero, if he shall survive her, to have and
Intention.	enjoy during his natural life, and at his decease

to pass to and vest in fee in his children, if any he have, or their descendents, but in default or failure of such

direct heirs, children or grandchildren him surviving, then at the time of his death the title to said realty in fee shall pass to and vest in my right heirs."

Clause 2, including the words in parenthesis supplied, reads:

"If, however, my said wife shall survive said Manuello, (and he leave no issue) then she, said Theresa Bernero, is hereby empowered to devise said realty as she shall see fit, or if she shall fail to make such testamentary disposition of same, then said realty, upon her death, shall vest in my right heirs, if she shall survive said Manuello; I authorize and empower my said wife during her lifetime, and if said Manuello shall survive her and enter upon the enjoyment of said realty, then said Manuello, during his lifetime, to lease said realty thus bequeathed to them for life as aforesaid, successively, on such terms as they severally deem proper, each exercising such right during her or his life tenancy, for leasehold periods not exceeding twenty-five (25) years each."

Paragraph 7 devises substantially the residue of the estate, one-half of it in value, to his wife, Theresa.

By the first clause of paragraph 5, Louis Bernero plainly provided that Theresa, then well advanced in years, and his son Manuello should each have a life estate in the property; that Manuello's enjoyment of his life estate should be postponed until her death. At Manuello's death the remainder was to vest in fee in his children, "if he have any, or their descendents, but in default or failure of such direct heirs, children or grandchildren, him surviving, then at the time of his death" the fee was to vest in the right heirs of the testator. If Manuello had children, the remainder was to vest in them unconditionally at his death. If he had none, then it was to vest in the right heirs of Louis Bernero unconditionally.

If the doctrine of the majority opinion be sound, that Manuello's children should take the remainder only on the contingency that he survived Theresa, then it

follows that in the event he left no issue, testator's right heirs would take nothing under the will.

This theory of construction is irrational and does not accord with human experience. It was advanced in the case of *RoBards v. Brown*, 167 Mo. 447. George Brown, the testator, had three sons and one daughter, all married. He bequeathed one dollar to each of them. By the next clause he devised all of his real and personal property to his wife during her life or as long as she remained single, and added this express provision: "In the event my wife should not be living at my death, then in that event, I will that all my property, real and personal, be distributed as follows: To my daughter, Mary B. White; to my daughter-in-law, Mary V. Brown, wife of my son J. Van Brown; to my daughter-in-law, Delia A. Brown, wife of my son John J. Brown; and to my son, William G. Brown, each an undivided one-fourth part of my personal and real estate." The testator's wife survived him. The two sons, J. Van and John J., were insolvent. After the death of the testator, plaintiff bought the interest of John J. in the real estate devised at sheriff's sale. He contended that by the plain, positive terms of the will, the wife of John J. took nothing under the will because the testator's wife survived him. The court said:

"This construction must therefore be discarded and rejected, if any other construction is possible.

"The intention of the testator was plainly this; first, to prevent his sons' creditors reaching or sharing in his property; second, to provide for his wife for life, if she survived him and remained single; third, after his wife's death, whether before or after his will took effect, to provide for his children and their families, and to do it in such a manner as to exclude his sons' creditors from participating in any of his estate.

"This intention being plain, the only question remaining is, has the testator expressed it in such manner as not to vitiate his intention by using words and terms that violate some inflexible rule of law? It is argued that

the words: 'In the event my wife be not living at the time of my death,' etc., have this effect. Those words are wholly superfluous and meaningless, and the estates created by the will would be exactly the same and would take effect at exactly the same time, and upon the same contingencies if no such words were in the will. Thus a life estate was devised to the wife. If she survived her husband, that estate would take effect at his death, and continue during her life, and the fee-simple estate in remainder would not vest in the children or devisees until the termination of the life estate. On the other hand, if the wife died before the testator, the life estate to her could never vest, and the fee-simple remainder would take effect at once. Hence, the words, 'In the event my wife should not be living at my death,' etc., provide for no contingency that is not fully provided for by law, and, therefore, those words serve no purpose whatever and should be discarded.

"Neither do those words create a condition upon which the remainder in fee is to become operative. They are properly only words descriptive of when and not upon what condition the remainder in fee is to vest, which, as shown, is exactly what the law is without such words. [Skipwith v. Cabell, 19 Grattan, 758.]"

Let us again look at clause 1 of paragraph 5—"and at the time of her death the same to pass to our adopted son, Manuello Bernero, if he shall survive her, to have and enjoy during his natural life and at his decease to pass to and vest in fee in his children."

The intention of the testator is to avoid the vesting of a joint life estate in his widow and son and to make this clear he postpones the enjoyment of Manuello's life estate until his widow's death. The vesting of the remainder in Manuello's children is not conditioned on the contingency that Manuello should survive Theresa. That is not the condition upon which the disposition is to become operative, but the time when it is to become effective.

In *Skipwith v. Cabell*, 19 Grattan (Va.) 758, a codicil read: "In case of a sudden and unexpected death, I give the remainder of my property," etc. The testatrix did not die either suddenly or unexpectedly. Held that this was not a conditional legacy, dependent upon the sudden or unexpected death of the testatrix. Such an expression could not properly be construed as creating a condition unless accompanied by other language so clear as to admit of no other interpretation. (784)

The rule is that where a devise is limited to take effect on a condition annexed to a preceding estate, if the preceding estate should never arise, the remainder over will, nevertheless, take place, the first estate being considered only as a preceding limitation and not as a preceding condition to give effect to a subsequent limitation. The death of Manuello before that of Theresa had no other effect on the title of plaintiff than to remove one preceding life estate between his vested remainder and possession. [1 *Fearne on Rem.* 510, 517; *U. S. Trust Co. v. Hogencamp*, 191 N. Y. 281; *Ege v. Hering*, 108 Md. 391.]

Abbott v. Middleton, 21 Beavan, 143, decided by Sir John Romilly as Master of the Rolls, and on appeal to the House of Lords in 7 House of Lords Cases, 68, is directly in point. The will involved in that case gave the widow of the testator a life interest in certain funds, just as the will in the present instance gave a life estate to Theresa Bernero, and then it made the following provision concerning those funds:

"And on her decease, the sums provided and set apart for such payment to become the property of my son George Carpenter (now Captain in his Majesty's 41st Regiment of Foot), so far as he, the said George Carpenter, my son, shall receive the interest on such sum during his life, and on his demise, the principal sum to become the property of any child or children he may leave, born in lawful wedlock, and in such sums as my said son shall will and direct. But in case of my son dying before his mother, then, and in that case, the prin-

cial sum to be divided between the children of my daughters, (naming them) in equal portions to each."

The Master of the Rolls held that the provision, "In case of my son dying before his mother, then and in that case the principal sum to be divided between the children of my daughters, (naming them) in equal portions to each" should be construed as meaning that that disposition should be made in case the son died before his mother without issue; in effect, the words "without issue" were supplied by implication. The Master of the Rolls said:

"In the second branch of the sentence, the testator proceeds to give the property over, if the son died before his mother. If the meaning of this be that the gift over is (to) take effect whether the son leave children or not, merely because he predeceases his mother, it appears to me to be in a great degree inconsistent with and repugnant to the gift to the children of the son. I am at a loss to conceive, upon what principle the testator could have meant this bounty toward his grandchildren to depend upon the circumstances whether their father survived his mother or not. A bequest to grandchildren if their father survived his mother, but nothing to them if he did not, seems absurd, inconsistent and repugnant to itself, unless explained and made rational by some peculiar extrinsic circumstances, none of which exist in this case. To impute such an intention to the testator seems to me to be what the court will not do, unless the words and the authorities are too strong to be overcome."

The Lord Chancellor and Lord St. LEONARDS reached a similar conclusion when the case came before the House of Lords. The Lord Chancellor characterized the bequest as expressed "capricious and irrational." [7 House of Lords Cases, l. c. 87.] He declared, *ibid*, p. 81;

"It is impossible to entertain any moral doubt of the testator's intention, and there is, therefore, great danger of the mind being strongly and improperly influenced by this consideration. But disclaiming all right to act upon any conjectural interpretation, I have ar-

rived at a satisfactory conclusion that in the will itself there can be found an ample justification for the decree which has been pronounced."

Lord ST. LEONARDS said, *ibid*, page 95:

"Now if I were asked, morally speaking, what the intention of the testator was, I cannot have the slightest doubt about it. . . . The property is actually given without any doubt or ambiguity to the son's children, so that if it is to be taken away from the children, we must find clear words to effect that object."

Lord ST. LEONARDS further said, *ibid*, page 96:

"Now there is one important observation in this case. There is no contingency expressed or implied upon which the property is given to the children. There is no contingency in the gift itself to the children. There is no exclusion of the children upon the happening of a contingency upon which the property is given over."

On page 101, he repeats this thought, as follows:

"And then comes in that important observation, as I consider, which I have already made, that in the gift to the children of the son there is no contingency expressed, and in the gift over of that property upon the contingency of the wife surviving the son, there is no exclusion whatever referred to of the children. I find, therefore, the property remaining in the children, and in my apprehension clearly unaffected (speaking still of intention) by the gift over."

Two of the Justices, while practically, if not actually, conceding that the testator never could have intended that which his words expressed, yet felt themselves unable to construe the will according to that apparent intention. Lord Wensleydale said:

"Nothing can be more reasonable than to suppose that he meant in this case to provide that his son's children, after their father's death, should take the property bequeathed to their father for life, whether he died in his mother's lifetime or afterwards. . . .

"My advice, therefore, to your Lordships would be to reverse the decree of the Master of the Rolls. If that

should not be the result, I can only say that I am glad, because I believe that it was a mistake on the part of the testator." [7 House of Lords Cases, pp. 113 and 120.]

But our statute, Section 555, Revised Statutes 1919, commands us to have due respect to the true intent and meaning of the testator.

It will be seen that the Abbott and RoBards cases are in accord. Indeed, the RoBard case seems to be stronger for appellant in this, that the devise in that case was conditioned expressly, and not by implication, upon his wife being dead when the will took effect and that, as his wife was alive when he died, the devise to the children failed and therefore only the devise to the widow remained and the fee descended to his heirs, subject to the life estate. [167 Mo. l. c. 459.] But this court held that those words *did not create a condition* but were only descriptive of the time when the remainder in fee is to vest. That is the general rule as has been seen from citations supra.

Bernero's will says, expressly, "at his decease to pass to and vest in fee in his children, but in default of such direct heirs at the time of his death, the title . . . shall . . . vest in my right heirs." In view of this plain provision, whether Manuello was "in or out of the body" when Theresa died seems to be wholly irrelevant. Of course Manuello's life estate fell in at his death, but to say that it was the clear intention of the testator to disinherit not only his own grandchildren but, in default of grandchildren, that he also intended to cut off his own brothers and sisters in the event Theresa survived Manuello, contravenes not only the established rules of construction which made it a limitation and not a condition, but the strong presumption founded on human experience (which accords with the ordinances of God and man), that he did not intend to cut off his own flesh and blood and leave his estate to strangers. [40 Cyc. 1412.] Such conclusion is allowable only when the rules of construction will not permit another. The will clearly shows that Manuello's children were the first objects of the testator's affection, and that, in default of such children, he naturally

turned to his brothers and sisters. "If the disposition violates all natural laws, justice and humanity, juries and courts will resort even to technicalities to prevent a great wrong." [Bowman v. Phillips, 47 Ind. 341.]

II. The next provision of the will is, "If, however, my said wife shall survive Manuello, then she is empowered," etc. It is claimed this clause was clearly intended to disinherit the testator's grandchildren and his brothers and sisters as well, if Theresa survived Manuello, with or without issue.

If these clauses are read literally, there is a clear repugnancy. We must read this will from the viewpoint and environment of the testator and harmonize it consistently, if that may be done, with the testator's intention: Courts assume that a testator, dictating a will under the influence of family relations, will seldom intentionally cut off the issue of a son or daughter for the benefit of strangers, without some good reason therefor.

What was there, if anything, that turned the testator's affections awry and led him to disinherit Manuello's children and give his property to strangers, as respondents contend? We can find nothing in the record. Evidently the power of appointment was to be exercised only in the event Manuello left no issue. The dominant purpose of Bernero, however bunglingly expressed it may have been, was to provide a life estate for his widow and, subject to that, a life estate for his son with remainder in fee to his son's children, if he had any, but, in default of issue, to leave the property to his brothers and sisters.

We have another clear illustration of the rule of supplying, transposing and substituting words when necessary to harmonize the will with reason and common sense, in *Nichols v. Boswell*, 103 Mo. 151. The will contained the following provisions: 1. One dollar each to two grandchildren. 2. A devise of all real estate to testator's granddaughter, Minerva Nichols (daughter of a deceased daughter, Permelia Hudson), and the testator's two daughters, Mary Boswell and Amanda Hudson, share and share alike. 3. A further devise reading as follows:

"I further will, that in case the above-named Minerva Nichols and Amanda Hudson, or either of them, should be dead and not now living, then all of my estate, both real and personal, I give and devise and bequeath to my daughter Mary, wife of John Boswell. . . . "

Amanda Hudson died before the testator, and it therefore clearly followed from the above quoted third provision, taken literally, that the daughter, Mary Boswell, was entitled to the entire estate; for that provision specifically stated that, if either Minerva Nichols or Amanda Hudson should be dead, then all of the estate was to pass to Mary, to have and to hold, to her and her heirs forever. The court said (pp. 157-158):

"There is no uncertainty about these bequests. They are unequivocal and absolute, without condition or qualification. The division of the property and the provisions for the proper and natural objects of his bounty, thus made, were just and equitable, such as might have been expected from a parent who wished to show no partiality or preference among his children or their descendants. . . . "

When he comes to make a third clause, had his intention changed, and did he intend thereby that, if his daughter Amanda was not living, his grandchild who was first named, who was apparently first in his thoughts and affections, should be disinherited? There was no such connection between plaintiff and Amanda, as could raise even a suspicion that their interests should stand or fall together."

To accomplish what it found to be the intention of the testator, the Court supplied or interpolated in the third paragraph of the will the words "undisposed of" so as to vest in his daughter Mary only "all my estate, both real and personal, undisposed of," and in doing this the court said (p. 160):

"This supplying of words to effectuate the manifest intention is allowable under the well-known rule, 'that in the construction of a will the intention of the testator, apparent in the will itself, must govern, and that

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in order to effectuate that intention, as collected from the context, words may, when necessary, be supplied, transposed or changed. And it is no objection to supplying the omission, that different persons may differ in regard to which of two or more words, of similar significance, will more appropriately supply the omissions.'

The proof from the whole will and from the condition of the parties, their relation to each other, and the character of the property, is manifest and convincing, that these or similar words were inadvertently omitted from the will.

The evidence introduced for the purpose of showing the situation of the parties was proper, and there was no error in admitting it. In the construction of ambiguous or conflicting provisions the situation of the parties may very properly be taken into view."

In *Grace v. Perry*, 197 Mo. 550, a clause in the will reads: "But should both of my children die without issue of their body, then my grand nephew, Charles F. Loker, shall inherit all my property." It was held to provide for a devolution of those shares in case of the death of the children or either of them. Held, also, that in construing wills all technical rules of construction must give way, and, in arriving at the intention, the relation of the testator to the beneficiaries and the circumstances surrounding him at the time of the execution of the will should be considered and the will read from his viewpoint.

In *Briant v. Garrison*, 150 Mo. 655, the testator gave all of the land east of the center line running north and south between sections 8 and 17, and gave the remainder of his property to his brothers and sisters. A literal reading of this clause disinherited those who were first in the affections of the testator, and gave all the property to his brothers and sisters. The court substituted the word "through" for "between." The judgment was affirmed, citing many cases. [See page 668.]

In *McMahan v. Hubbard*, 217 Mo. 624, it was found from a consideration of all the circumstances that the de-

scription of the land devised to a daughter and an adopted son was erroneous and the judgment of the trial court correcting it was affirmed.

In *Wells v. Wells*, 279 Mo. 57, l. c. 64, words omitted in the sheriff's return were supplied to sustain a judgment by default.

In *Dulaney v. Dulaney*, 79 S. W. 195, the will provided that the testator's grandson, Woodford, should receive the income from his part of the estate until he was twenty-five years of age. "If he should die before twenty-five, one-third of his income is to go to his mother if she remains unmarried. If she marries, one-sixth. . . . The rest to be divided between the heirs living and heirs of any deceased." The court said, following *Abbott v. Middleton*:

"There can be no reason for supposing that the testatrix ever had such an absurd purpose as to disinherit Woodford's children, if he died before he was 25 years old, but if he managed to live until after he was 25, they were to have all his property upon his dying intestate. . . . Therefore, to carry out testatrix's intention, there should be read into this clause the words 'without issue' so that the sentence would read: 'If he should die before he is 25, without issue, one-third of his income is to go to his mother,' etc."

The words "without issue" were also supplied by the court in the case of *Selden v. King*, 2 Call (Va.) 74, which contained the following provisions:

"Item: It is my further will and pleasure that if the child should die wherewith my wife now goes withall then I give and bequeath unto my said dear and loving wife Mary Achilly, and her heirs forever, all my lands, houses, . . . chattels movable and immovable, also all my debts that is due, owing and belonging to me in this county or in any other part or place whatsoever."

The court, in concluding its discussion of the matter, at page 91, said:

"According to which idea, the true construction is, that the testator by the latter words 'if the child should

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die,' referred to the preceding devise to the daughter in tail, and meant to add the words, 'without heirs of her body,' but inadvertently omitted them. Therefore, in order to fulfill his intention, and carry the dispositions, he was making, into effect, it is necessary to supply those words: And then, upon the death of the daughter without issue, the remainder in fee took effect in possession in the wife."

The same result was reached in the case of *Liston v. Jenkins*, 2 W. Va. 62, where the devise was as follows:

"Thirdly, the lands which I now live on, exclusive of that which I have bequeathed to my son, Jonathon Jenkins, I give and bequeath to John, my son-in-law, and Rebecca Smith, my daughter, after my wife's decease, fully to be possessed and enjoyed by them during their natural lives, and after their decease, the said land to fall to their son, John Jenkins Smith, and in case of his death, the land is (to) fall to the rest of John Smith and Rebecca Smith's children."

It was held by the court that to effectuate the intention of the testator, the words "without issue living at his death" should be supplied after the words "and in case of his death," so that the provision would read: "And in case of his death without issue living at his death, the land is," etc. (l. c. 65.)

In *Young v. Harkleroad*, 166 Ill. 318, the words "without such heirs" were supplied after the words "in case of the death of either one" in the latter portion of a devise reading as follows:

"6th. It is my will and I do hereby bequeath (described) to my sons, William and Isaac, and to my daughter, Florence, and to my granddaughter, Annie B. Kinder, during their natural lives, and after their decease to the heirs of their bodies (excepting only the heir now living of Annie B. Kinder, who shall not receive any portion whatever above that set apart and heretofore mentioned), and in case of the death of either one, then their portion to descend and belong to the heirs of the other persons mentioned in this section, in equal portions."

In that case the court said:

"The testator in this clause bequeathed his real estate to his children and grandchildren 'during their natural lives, and after their decease to the heirs of their bodies.' Thus far his meaning is clear and plain. But the remaining portion of the sentence, 'and in case of the death of either one, then their portion to descend and belong to the heirs of the other persons mentioned in this section,' taken literally, directly contradicts what has just been said It is apparent that the sentence, as it stands, does not literally express the testator's intention. We . . . think that provision is understood, by implication, to mean 'in case of the death of either one *without such heirs*, then their portion to descend and belong to the heirs of the other persons, etc. Under this construction there is no necessity of rejecting any part of the will, nor of adding anything thereto, the words 'without such heirs' being plainly inferred. The defect in the language is simply a verbal omission, and being so, the true meaning of the clause may be implied, 'in order to reach the obvious intent of the testator.' " (l. c. 323-325.)

In *Nelson v. Combs*, 18 N. J. L. (3 Harr.) 27, the court supplied the words, "under age and without lawful issue," after the word "die" in a clause in a will reading as follows:

"And further, it is my will, that if William or Thomas should die, or either of them, the remainder to enjoy the other's property."

In that case, FORD, J., said:

"But they" (referring to William and Thomas) "being both young and liable to die under age, and without lawful issue, he meant to provide for such an event by adding 'that if either of them die, the *survivor* shall enjoy the other's property, 'evidently meaning, die under age, and without lawful issue. If, they should leave any *issue*, he had before given it to such issue by the name of *heirs*; he never intended to take it from such issue, by giving both shares to the *survivor*, thus making him a double portion, and leaving the bereaved children of the deceased son

destitute of the very support he had so carefully provided for them by the name of heirs. It is contrary to the justice of all his other provisions to suppose it. Being unlearned, he left out the words *under age and without lawful issue*, by mistake." (l. c. 37.)

The will involved in *Baker v. Estate of McLeod*, 79 Wis. 534, gave the entire estate to the executor in trust, and directed the executor to remain in possession until the testator's daughter, Annie May McLeod, should attain the age of 21 years, when the estate was to be transferred to her. It further provided as follows: "But if the said Annie May McLeod shall die under the age of 21 years, then all my aforesaid estate, or proceeds thereof, with the rents, . . . shall immediately after her death be paid, applied and disposed of in the manner following" (the will then provided for other disposition). The court held that, notwithstanding that the will provided clearly for the disposition over in case the testator's daughter died before attaining the age of 21, it should be construed as meaning that this disposition should become effective only if the daughter died before that age, and left no issue. The opinion cites in support of this view, *Abbott v. Middleton*, *supra*; *Liston v. Jenkins*, *supra*, and *Nelson v. Combs*, *supra*, and proceeds upon the ground that "it may safely be assumed that, where a will is dictated under the influence of family relations, it would seldom happen that a testator would intentionally cut off the issue of a son or daughter from taking the share of the parent in his estate for the benefit of collateral objects." (p. 545.)

In *Ball v. Phelan*, 94 Miss. 293, 49 So. 956, the Supreme Court of Mississippi said:

"The court may assume that testator dictating the will under the influence of family relations, will seldom intentionally cut off the issue of a son or daughter from taking the share of the parent for the benefit of collateral objects.

"Where a will necessarily confines the interest of a child of testator to his life, the court may lay hold of slight circumstances to raise a gift in the issue of such

child, and thereby avoid imputing to the testator the intention of giving the property to the devisee over, and leaving the issue of the life tenant unprovided for."

The Court of Appeals of New York held in *The Matter of the Estate of Brown*, 93 N. Y. 295 (as appears from the *syllabus* in the case), as follows:

"Where a will is capable of two constructions, one of which will exclude the issue of a deceased child, and the other permit such issue to participate in a remainder, limited upon a life estate given to a parent of the child, the latter construction should be adopted."

The same court said, in *March v. March*, 186 N. Y. l. c. 103:

"In ascertaining such intention we are required to take into consideration the surrounding circumstances under which he framed the provisions of the will, the situation of his estate, and of the members of his family whom he wished to be the recipients of his bounty. In considering these circumstances for the purpose of ascertaining the intention of the testator, there is a presumption which we must bear in mind, and that is, that, in the absence of unfriendly relations existing between testators and their descendants, there almost invariably exists a desire and an intention . . . that their property should go to their descendants, rather than to strangers to their blood."

Abbott v. Middleton, on the point in question, has been expressly followed in *Metcalf v. Framingham Parish*, 128 Mass. l. c. 374, and *Sanger v. Bourke*, 209 Mass. 481, l. c. 487-488.

III. The first clause of paragraph 5 gives the remainder in fee to the children of Manuello. That is clearly settled by *RoBards v. Brown*, *supra*. The second clause takes it away and gives the wife of the testator, if she shall survive Manuello, no beneficial interest is the property, but the bare power of appointment. The testator could not have intended that both clauses, as written should be operative. It is a cardinal rule of construction that where there is a clear

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gift in one clause of a will, it cannot be cut down or limited by a subsequent clause unless it is as clear and decisive as the language of the clause which devises it. [Cornet v. Cornet, 248 Mo. l. c. 224, 154 S. W. 121; Thornbrough v. Craven, 225 S. W. 445, l. c. 447.] There can be no presumption that Louis Bernero intended to give the remainder to Manuello and in the next breath to take it away from him. There is evidently an ellipsis. We have cited a number of cases where the courts have not hesitated to harmonize similar inconsistencies by supplying the words "without issue." If the words suggested be supplied, both clauses will harmonize and be consistent. We think this should be done. In doing this we are not making a new will. The supplied words will clearly effectuate the intention of the testator.

There are other questions discussed in the briefs but we think it unnecessary to go into them. This case was originally assigned, in Division One, to SMALL, C., whose very able opinion reversing the judgment and remanding the cause was concurred in by BROWN and RAGLAND, CC.

The judgment should be reversed and the cause remanded with directions to enter judgment for the plaintiff and against the defendants in accordance with this opinion. Woodson, J., concurs.

THE STATE ex rel. CHARLES O. MANKER v.
JAMES ELLISON et al., Judges of Kansas City
Court of Appeals.

In Banc, April 30, 1921.

1. **CERTIORARI TO COURT OF APPEALS:** Application for: Sufficiency of. An application for a writ of *certiorari* to review an opinion of a Court of Appeals on the ground of conflict with a controlling decision of the Supreme Court does not comply with Rule 34 of the Supreme Court, when the application itself does not "set out the issue presented to the Court of Appeals or show wherein and in what manner the alleged conflicting ruling arose," but merely states that the decision of the Court of Appeals is in conflict with the last reported decisions of the Supreme Court on the

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point in issue and refers to the opinion of the Court of Appeals and suggestions in support of the application filed with the application.

2. ———: ———: ———: **Waiver.** The respondents having waived the insufficiency of the application for the writ, and the writ having been granted and return made, the Supreme Court will consider the suggestions made by relator.
3. ———: **Conflict of Opinions: Guarding Dangerous Machinery: Statute.** The Supreme Court has never construed Section 7828, Revised Statutes 1909 (Section 6786, Revised Statutes 1919), to mean that if the appliances provided to safely and securely guard dangerous machinery should, without any negligence of the master, suddenly get out of repair or fail to function then, in such case, there was a failure to comply with the statute.
- *. ———: ———: ———: ———. The Court of Appeals reversed a judgment for relator against his master for personal injuries sustained while working at a planing machine, which relator's petition alleged was operated without having any safe and secure covering, guard or protection to prevent workmen coming in contact with the rotating knives of said machine and which it was alleged the master carelessly and negligently failed to safely guard. The facts showed that a guard was provided which could be adjusted by a thumb-screw to any required height. For some unexplained reason this guard suddenly and unexpectedly failed to work when relator attempted to lower it and so he tightened the thumb-screw to hold it in place and proceeded to use the machine with it in that position. It was relator's duty to adjust the guard. While using the machine to plane a heavy board with the guard as stated his foot slipped on a loose piece of gas-pipe lying on the floor and covered with shavings and his arm and hand were thrown against the knives and he was injured. *Held*, the decision of the Court of Appeals was not in conflict with any decision of the Supreme Court.

Certiorari.

WRIT QUASHED.

C. W. Prince, E. A. Harris, E. C. Hamilton, and James N. Beery for relator.

The decision of the Kansas City Court of Appeals is in conflict with the decisions of the Supreme Court of Missouri and decisions of the Court of Appeal. Hayes

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v. Sheffield Ice Co., 221 S. W. 707; Wagner v. Const. Co., 220 S. W. 898; Hughes v. Mfg. Co., 188 Mo. App. 549; Cole v. Lead Co., 240 Mo. 408; Lore v. Mfg. Co., 160 Mo. 608.

John H. Lucas for respondent.

(1) None of these cases cited by the relator in any manner conflict with the opinion in the instant case. (2) The opinion of the Court of Appeals is fully justified in the principle of law in Huss v. Bakery Company, 210 Mo. 51-52; 18 R. C. L. 544; Strode v. Box Co., 250 Mo. 728; Cordage Co. v. Miller, 136 Fed. 495; 26 Cyc. 1255; Benner v. Lumber & Mfg. Co., 56 Wash. 679; Cole Mfg. Co. v. Racine, 43 Ind. App. 695; Honor v. Albrighton, 93 Pa. 475.

HIGBEE, J.—*Certiorari* to the Kansas City Court of Appeals. The application for our writ of *certiorari* in this cause recites, *inter alia*, that the respondents, judges of the Kansas City Court of Appeals, have rendered judgment in a certain cause pending in said Court on Appeal from the Circuit Court of Jackson County, in which relator was plaintiff and “that said above tribunal in rendering its decision in the cause aforesaid has disregarded and is disregarding the last reported

decisions of the Supreme Court touching the points in issue, which are in direct conflict with the opinion in the case, as will more fully appear in the certified copy of the opinion of said court heretofore rendered, together with the suggestions herewith filed in support of this application.” Wherefore your petitioner prays, etc.

The foregoing excerpt is all that is said in the application touching the decision of the Court of Appeals. It does not state that the judgment of the Court of Appeals was adverse to relator. It does not “set out the issue presented to the Court of Appeals or show wherein and in what manner the alleged conflicting ruling arose.”

**Application
for Certiorari:
Requisites of.**

It does not refer to any decision of this court with which the ruling of the Court of Appeals is said to conflict. The application is followed by a statement and suggestions in support of the application, setting forth the allegations of the petition, the statute on which the action is based, and excerpts from the opinion of the Court of Appeals with reference to certain decisions of this court with which it is said the decision is in conflict.

The application does not conform to the requirements of Rule 34 of this court but since the respondent waived the insufficiency of the application and the writ was granted, we will consider the suggestions made by the relator.

Relator sued the Standard Oil Company of Indiana for damages for personal injuries sustained December 18, 1916, as alleged in his petition, while working at its planer, a machine having knives on a cylinder rotating at a high rate of speed, without having any safe and secure covering, guard or protection to prevent workmen coming in contact with said rotating knives, and carelessly and negligently failed to safely guard said planer.

**Statement
of Case.**

On the trial of the cause, plaintiff recovered judgment from which the defendant appealed. The judgment was reversed by the Court of Appeals.

The action is based on Section 7828, Revised Statutes 1909 (Sec. 6786, R. S. 1919). It appears from the opinion, *Manker v. Standard Oil Co.*, 221 S. W. 139, that defendant provided a guard which could be raised or lowered and kept at any desired height by means of a thumbscrew. When this guard was let down, it afforded ample protection to the workman at the planer.

It further appears from the opinion that the plaintiff undertook to use the planer and found he could not lower the guard; that he was familiar with the use of the machine and knew the danger of operating it without having the guard in proper position; that he did not notify any one of his inability to lower the guard, but, thinking that he could operate the planer, tightened the

thumbscrew to prevent the guard falling, placed a heavy plank on the planer and turned on the power; that while so at work, he stepped on a piece of gas pipe concealed in some shavings, slipped and fell with his hand and arm on the revolving cylinder and sustained the injuries complained of. The opinion recites:

“He (plaintiff) says that when he took the board to the planer he found the guard was up ‘too high.’ . . . Plaintiff says he tried to get the guard down but it would not move, whereupon, to prevent it coming down on account of the jar of the machinery during the prosecution of the work, he tightened the thumbscrew so it could not do so. He went ahead with the planing of the board, knowing and being fully aware, so he himself says, of the danger of using the machine with the guard thus raised above the table. He says also that the board could easily have been run through the planer with the guard down close to the table top and that it was unnecessary to have it raised any distance therefrom. He says also that he did not notify the superintendent or foreman or anyone that the guard would not come down; and there was no evidence that the guard had been so that it would not come down for any length of time prior to this occasion when he tried to lower it.

In the course of planing the edge of the board, plaintiff says he stepped on a piece of gas pipe which he did not know was in the shavings on the floor, and this gas pipe rolling under his foot caused him to lose his balance and fall forward thrusting his left hand and arm down against the revolving knives whereby he was injured.

Thus it will be observed that in his pleading he has charged a *failure* to guard as required by the statute at that time in force, while in his evidence he shows that there *was* a guard; that the guard was *adjustable* so made as to permit timbers of different sizes to be planed on said machine; that the duty of adjusting the guard in accordance with the particular timber to be planed was upon the one desiring to use the machine; that it was unnecessary to have the guard raised at all in order to plane

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this particular board; that had the guard been down close to the surface of the table he would not have been injured; that when he found the guard was up and would not come down he did not inform the defendant or anyone in authority so that the guard could be adjusted; but without saying anything to anyone, except his associate who plaintiff says tried with him to lower the guard, and knowing full well the danger of so doing, plaintiff proceeded to use the machine with the guard as it was. There was no claim that the guard had been in this condition for *any* length of time prior to plaintiff's attempt to lower it. . . . "

"The cause of action pleaded was a failure to safely and securely guard *when possible*, a duty imposed by statute. The evidence disclosed that a safe and secure guard was provided; that to do the work required of the machine the guard had to be adjustable, that is, movable up and down according to the work to be done, and this adjustment was to be done by the operator before starting the machine; that there was a secure guard but for some mysterious reason it suddenly and momentarily refused to be adjusted; whereupon the operator, the only one who knew of this mysterious and sudden condition, chose to operate the machine with the guard up and without informing his master of the situation or giving him any opportunity to remedy the matter. The statute did not intend that the master should stand over and watch the machine and thus 'maintain' the guard in the sense required by the circumstances of this case. It is true, that in *Lore v. American Mfg. Co.*, 160 Mo. 608, the master was held liable under the statute where a guard was provided but which was *out of repair*. But in that case the defective state of the guard made it no guard at all, and this defective condition had existed from several months to two years before the injury, and the Supreme Court on page 675, say, 'We think the evidence was sufficient to show *negligence* in not repairing this guard.' " (Italics ours.)

Relator contends that as the guard was out of order and he was unable to lower it at the time of the injury, there was a failure to comply with the statute requiring dangerous machinery to be safely and securely guarded when possible; that the statute does not provide for any interval of time for the master to learn of and remedy the defective condition of the guard; it prohibits the use

**Dangerous
Machinery:
Statute
Construed.**

of such machinery at all without being securely guarded, and that the opinion of the court of appeals in reversing the judgment is in conflict with *Hayes v. Sheffield Ice Co.*, 282 Mo. 446; *Wagner v. Constr. Co.*, 220 S. W. 890; *Hughes v. Mfg. Co.*, 188 Mo. App. 549; *Cole v. Lead Co.*, 240 Mo. 397, 144 S. W. 855; and *Lore v. Mfg. Co.*, 160 Mo. 608, 61 S. W. 678.

In the *Lore* case the guard had been out of repair for from several months to two years before the injury. It was there said: "We think the evidence was sufficient to show negligence in not repairing this guard." That case is opposed to relator's contention. The recovery was based on a negligent failure to repair the defective guard. It is not an authority for the proposition that the master is liable in case he has provided a safe and secure guard which, for some unexplained reason, fails to function. In that case it was held that the master was liable for negligent failure to make repairs.

In the *Wagner* case it was held that under Section 7828, Revised Statutes 1909, prohibiting the use of unguarded, dangerous machinery, an employer is not given a reasonable time within which to guard the machinery but is absolutely forbidden to use it until it is guarded.

In the *Hayes* case the plaintiff was employed to dismantle an old ice-house. He was ordered to go on the roof to tear off sheeting and was assured that the place was safe, and while so engaged the wall fell and plaintiff was injured. Obviously, this case has no relevancy to the questions under consideration.

We have carefully examined the other cases cited by relator and are unable to find any conflict between them and the opinion of the court of appeals.

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Briefly stated, relator's contention is that this court has construed the statute to mean that the appliances provided to safely and securely guard dangerous machinery must be maintained and that if, without any negligence on the part of the master, the appliance so provided should suddenly get out of repair or fail to function, then, in such case, there was a failure to comply with the statute. Our attention has not been called to any case in which we have so ruled. The writ was improvidently granted and should be quashed. It is so ordered. All concur, except *Woodson, J.*, absent.

THE STATE ex rel. JOHN H. BERKSHIRE and BEN H. BERKSHIRE, Co-Partners as Berkshire Lumber CO., v. JAMES ELLISON et al., Judges of Kansas City Court of Appeals.

In Banc, April 30, 1921.

1. **CERTIORARI TO COURT OF APPEALS: Function of Writ: Discretion to Grant.** The writ of *certiorari* from the Supreme Court to review a decision of a Court of Appeals on the ground of conflict of opinions performs a double function, viz: (1) to prevent contrariety of opinions upon questions of law and equity in this State; and (2) if sustained, to quash an adverse judgment against the applicant for the writ. The issuance of the writ, however, is discretionary with the Supreme Court.
2. ———: **Must Apply Within Reasonable Time.** Neither the statutes of the State nor the rules of the Supreme Court fix the time limit for applications for writ of *certiorari* to review decisions by the Court of Appeals; but such applications must be made within a reasonable time after the decision of the Court of Appeals become final.
3. ———: ———: **What is Reasonable Time.** Inasmuch as under Section 1520, Revised Statutes 1919, and Section 15 of Article 6 of the Constitution, the Clerk of the Court of Appeals must certify to the circuit court a copy of the opinion of the Court of Appeals within thirty days after the filing of such opinion, which is construed to mean the day upon which a motion for rehearing, if one is filed, is overruled, the application for the writ of *certiorari* should in ordinary cases, be made within such thirty days.

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4. ———: ———: ———: **Laches.** Where application for a writ of *certiorari* to review a decision of a Court of Appeals on the ground of conflict with controlling decisions of the Supreme Court was not made until more than nine months after the motion for rehearing was overruled and more than seven months after the opinion of the Court of Appeals had been certified to the circuit court and judgment entered there pursuant to such opinion, and the applicant for the writ had not applied to the Court of Appeals for a stay of mandate to enable him to apply for the writ of *certiorari*, there was such delay and laches on the part of the applicant as to require the writ to be quashed.
5. ———: ———: ———: **Excuse.** The applicant having taken no action in the Court of Appeals to secure a stay of mandate until application could be made for the writ, it is no excuse that applicant, four months after the mandate had gone down to the circuit court and judgment pursuant thereto had been entered by that court, applied to the Supreme Court for a mandamus to the Court of Appeals to so write its opinion as to state the facts, as a preliminary step toward applying for the writ of *certiorari*, which application for a mandamus was denied three months before the application for the writ of *certiorari* was made.

Certiorari.

WRIT QUASHED.

Edgar C. Ellis, Hale H. Cook, Roy H. Dietrich and Ellis, Cook & Dietrich for relators.

There was no delay by relators to work a denial of the writ herein. (a) Taking up the point referred to in the paragraph, that the mandate had been delivered to the circuit court and judgment rendered as directed therein, and which respondents claim as a reason for the denying of this writ, certainly nothing was done in the circuit court in making a clerical entry under the judgment and mandate of the Court of Appeals which should be appealable or which in any way changed the status of the parties. The rights of the parties were fixed, if at all, by the judgment in the Court of Appeals. When the motions for rehearing and to certify the cause to the Supreme Court were overruled, there was nothing further to be done except by appeal.

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ing to the superintending control of the Supreme Court after the respondents herein had exceeded their jurisdiction. *Orvis v. Elliott*, 147 Mo. 231. (b) This court has heretofore held that the fact that the mandate had come down before the application for the extraordinary writ was made was immaterial and was not laches. *State ex rel. v. Smith*, 172 Mo. 629, 630. (c) Also as a matter of actual practice, these respondents know from their own experience that the writ of *certiorari* may and does issue and that thereafter the record in said Appellate Court be quashed, although the mandate has been sent down. This was true in the case recently decided of *State ex rel. Development Co. v. Ellison*, 222 S. W. 783, in which the Supreme Court granted the preliminary writ of *certiorari* and thereafter quashed the record. The mandate in that case had been sent down to the circuit court, and, in fact, execution had been issued thereunder. (d) As to the further claim of laches as advanced by the respondents, immediately following the overruling of the motion for rehearing and failing that to transfer to this court, in November, 1919, motion was filed by way of notice with the respondents to withhold issuance of mandate because lien claimants, including the relators, purposed to apply to this court for writ of *certiorari*. Thereafter the lien claimants applied to Supreme Court for writ of mandamus as shown by the files of the Supreme Court raising and urging the point that respondents herein had failed properly, adequately and legally to state in their opinion the essential facts as presented by the record. The court denied the application for the writ of mandamus and your relators then lodged their application for writ of *certiorari*. This is called to the court's attention for the reason that due notice was given and there is no claim that the rights of any parties intervened. The property still stands in the hands of the defendants and no one is shown to have suffered except the relators and the other lien claimants who have made possible by their material and labor the Holckers' home and who are still without pay for same.

Scarritt, Jones, Seddon & North for respondents.

This writ should be denied by reason of the delay of relators. (a) This court has, in no uncertain terms, stamped its disapproval upon the laches of parties in seeking discretionary writs in this court. *State ex rel. v. Gibson*, 187 Mo. 555. (b) Likewise, it has been established by the decisions of this court that after a trial has been had in the circuit court and a new trial granted and a second trial had, a party litigant will not be permitted to go back of the last trial and question the action of the court in setting aside the first verdict and granting a new trial. *Davis v. Davis*, 8 Mo. 56; *Ess v. Griffith*, 128 Mo. 50; *Samuel v. Morton*, 8 Mo. 633, 635; *Trundle v. Ins. Co.*, 54 Mo. App. 188.

GRAVES, J.—*Certiorari* to the Kansas City Court of Appeals. The proceeding *nisi* out of which the present proceeding grows was that of a copartnership under the name of Berkshire Lumber Company v. Ima H. Holcker, Otto L. Holcker, et al. It was an action under the equitable mechanics lien law, Act of 1911, p. 314. The Berkshire Lumber Company being desirous of enforcing a lien against property in Kansas City which belonged to Mrs.

Statement. Ima H. Holcker, brought action against her and her husband (Otto) and all other lien claimants.

In the trial court the verdict of the jury favored Mrs. Holcker, in that it found that her husband was not her agent in putting the improvements upon the property. The law requires, under given conditions, the submission of issues to the jury and bound the trial court by their verdict on such issues.

The circuit court granted the lien claimants a new trial, and Mrs. Holcker took an appeal from said order to the Kansas City Court of Appeals. In that court there were two hearings. January 17, 1917, there was an opinion by Judge ELLISON, reversing and remanding the cause with directions to the circuit court "to reinstate the verdict and enter judgment against the liens."

The case was then held up in the Kansas City Court of Appeals to await the decision of this court in *Boeckler*

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Lumber Company v. Wahlbrink, which had been certified to this court by the St. Louis Court of Appeals, 191 Mo. App. 334.

After our ruling in that case, the instant case was set down for re-argument in the Kansas City Court of Appeals. June 17, 1919, the Kansas City Court of Appeals rendered, through TRIMBLE, J., a second opinion, in the lower court by which the order was again reversed, with directions to reinstate the verdict of the jury and enter judgment against the lien claimants. November 10, 1919, the motion for re-hearing was overruled. November 10, 1919, a motion was filed by some of the lien claimants to withhold mandate, but this record does not show the action of the Kansas City Court of Appeals thereon. Relators here were not parties to this application. The application for our writ of *certiorari* was filed here on August 6, 1920.

Counsel for the respondents here, have filed in this court a certified copy of a judgment in the Circuit Court of Jackson County entered on the 30th day of December, 1919, by which it appears that on such date said circuit court entered up a judgment in accordance with the directions of the Kansas City Court of Appeals. It is charged in respondents' brief that the term has elapsed, and that judgment was not appealed from by any of the lien claimants. We judicially know that the term had elapsed, and further that no appeal can be taken from a judgment in a circuit court which has been entered by the express direction of an appellate court. This states the case for the single point, which we deem settles what our judgment here should be, on the record before us.

I. The writ of *certiorari*, such as we have in this case, has one particular function, and that is to prevent contrariety of opinions upon question of law and equity in this State. Of course the party who applies for our writ as against the judgment of a court of Appeals has the further interest of having an adverse judgment quashed. So as to the applicant for our writ, if he is successful in

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the case, a double purpose has been subserved, (1) contrariety of opinions has been thwarted, and (2) the adverse judgment as to him

has been quashed. But what ever the result of our superintending control of the appellate courts may be by our writ of *certiorari*, it is with this court a purely discretionary writ. The great number of applications refused, and the few granted, by this court, bespeak the discretionary character of this writ in this court. The books bespeak the further fact, that when upon a full hearing, we conclude that our writ was improvidently granted, we have always promptly quashed the same. So we need not seek further authority for the fact, that with this court, this character of a writ of *certiorari*, is purely discretionary. Our whole course of action so shows.

II. In this case however we have a new situation urged for the quashing of our writ. It is urged that the application was not timely made; that relators were guilty of laches in not acting sooner. We think that there is substance in this contention. The application was made more than a year after the opinion of the Court of Appeals was written and handed down, and more than nine months after the court had overruled the motion for rehearing. Of course the opinion was not a finality until the motion for rehearing was overruled. Pending such motion the whole matter was in the breast of the court, but when it was overruled, the opinion was a finality, so far as the Court of Appeals was concerned, unless the court, at the same term, of its own motion, changed its opinion and judgment. Such was not done in this case. The relator here waited nine months from the time the motion for rehearing was overruled. Not only so, but it waited until after the law directs that the Court of Appeals mandate should go down, and until after such mandate had gone down, and the circuit court acting thereon, entered up the judgment directed by the Court of Appeals. In other words in this particular case the judgment of the Court of Appeals had been fully executed, some seven months before there was an application here to have that judgment reviewed and quashed through our writ of *certiorari*. Was such application timely under these facts? We think not, and for reasons which follow.

III. Neither our statutes nor the rules of our court fix the time limit for applications for writs of *certiorari*. The question is one of first impression in this court, and one to be determined by reason, rather than authority. State laws, limiting and enlarging, the old common-law writ of *certiorari* are so divergent and variant, that their cases furnish but little light. It is clear that the aggrieved party should be granted by the Appellate Court, if notice is given of a desire to apply for our writ of *certiorari*, a reasonable time to make such application, and procure our ruling thereon. This the appellate courts of this State have always done so far as we have been able to learn. Nor is it shown in this case that the Kansas City Court of Appeals failed to give this applicant a reasonable time upon his application. In fact this relator made no suggestion to the Kansas City Court of Appeals about its desire to apply for a writ of *certiorari*. The record before us shows that Waterson Brothers, another lien claimant, on November 20, 1919, filed an application for stay of mandate until they could make application, and in their application it is suggested that they were informed and believed that Berkshire Lumber Company contemplated a like application for our writ. The record is silent as to what ever became of Waterson Bros. application to stay mandate, and singularly silent as to when the court's mandate went down to the circuit court. From the certified judgment of the circuit court we know that the mandate was there on December 30, 1919, the day upon which the circuit court fully executed the judgment of the Court of Appeals. Thus it will be seen that the relator in the instant case sat idly by from November 10th to December 30th, without application to this court, and permitted the judgment of the Court of Appeals to be fully executed by and through their non-action. The present relator did not act within a reasonable time, and so far as this record shows, the Kansas City Court of Appeals did not refuse to give any of the aggrieved parties a reasonable time in which to take their action in this court. The filing of their application and the granting

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of out writ thereon, would have stayed all further proceedings in the Court of Appeals. In fact in prohibition cases we have ruled that the filing of the application, and notice thereof to the circuit judge suffices to stay his hand. [State ex rel. v. Board of Trustees, 186 S. W. 1. c. 681.] Same rule should apply in *certiorari*.

In the reply brief of relator it is urged as an excuse for the delay that they brought in this court an action in mandamus to compel the Court of Appeals to so write their opinion as to state the facts, as a preliminary step toward filing the present action. We are asked to examine our record as to this, or rather to judicially know this fact. Whether proper or improper, we have examined our records, and the application for mandamus was not filed until April 17, 1920, and was refused by us on April 30, 1920. So that it appears that no steps were taken by relator until long after the circuit court had entered up its judgment in accordance with the directions of the Court of Appeals.

Under such circumstances after most serious consideration, we are forced to two conclusions (1) that the laches of the relator should require us to quash our writ, and (2) that where the Court of Appeals has, upon request of an aggrieved party, stayed its mandate for a reasonable time to allow such party to apply to this court for a writ of *certiorari*, and after the expiration of such reasonable time, and no action has been taken by the aggrieved party, then their mandate should go down. And further, if thereafter, the judgment of the Court of Appeals sought to be quashed has been fully executed, our writ should not go, and if it has gone, it should be quashed. The question of a reasonable time we take next.

IV. We have but little to guide us in determining a reasonable time. The Court of Appeals, so far as we have been able to judge, have exercised a reasonable discretion in the staying of their mandates, in order to allow applications to be made to this court for writs of *certiorari*. Such courts

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Time.

have likewise continued their stay without suggestion from this court, until this court has passed upon the application. This is all that aggrieved parties should want, and all to which they are entitled.

Section 1520, Revised Statutes 1919, requires the clerk of this court to certify a copy of the opinion to the circuit court within thirty days after it has been filed. The statute says that he "shall" so certify it within the thirty days. We construe our filing of the opinion for the purpose of this statute to be the day upon which we overruled the motion for rehearing. This because motions for rehearing might pend more than thirty days, and if not thus construed we might have the clerk certifying out our opinion and mandate, with a motion for rehearing pending, which motion might thereafter be sustained. When so ruled we have a period of thirty days between the overruling of the motion, and the day upon which the clerk shall certify out the opinion. By Sec. 15, Article VI of the Constitution the foregoing statute is made applicable to the Courts of Appeals. Having due regard to this statutory provision, we conclude that these thirty days should be the limit of reasonable time for aggrieved parties in the Courts of Appeals to get their application to this court. Of course Courts of Appeals, like this court, have control over their mandates and other process, and could grant a longer stay, if the necessities of the case required, and this court might be governed by extreme circumstances to hold a longer time to be within reason, yet it occurs to us that in the usual run of these *certiorari* cases this thirty day period, is a reasonable time, and in many cases more than reasonable time within which to apply to the Court of Appeals for a stay of mandate, and get their application for our writ duly served and filed here. The application to the Court of Appeals for stay of mandate should shortly follow the overruling of the motion for rehearing.

Under all the facts in this case, our writ heretofore granted, for the reasons aforesaid, should be quashed,

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and it is so ordered. All concur; *Woodson J.*, in result, for the reasons which were expressed in the decision in *Boeckler Lumber Co. v. Wahlbrink*, when that case reached this court from St. Louis Court of Appeals.

IN THE MATTER OF THE ESTATE OF WILLIAM F. GOESSLING, deceased: ARTHUR C. GOESSLING, ELEANORA F. PETERS and EVELYN V. GOESSLING (Children of Testator), Appellants, v. WILHELMINA M. GOESSLING (Widow of Testator).

In Banc, April 30, 1921.

1. **WILLS: Widow: Renunciation: Election.** Testator's estate was worth about \$200,000, of which \$160,000 was personal property and \$40,000 was real estate. His homestead was worth about \$14,000. His three children by a former marriage and his widow survived him. By his will he gave his widow the use of his homestead and \$200 per month to be paid to her each month out of his estate during her life or widowhood and also all his household effects. He also left an annuity to his mother and then gave the rest of his estate to his three children equally, and appointed his wife and son executors of his will without bond. The executors presented the will for probate and made formal application for letters testamentary, which were granted and they qualified. They filed an inventory and made settlements of the estate in the probate court. These papers were prepared and signed by the son, but were also signed by the widow, at his direction. He employed attorneys to advise and assist him in the administration, the widow leaving the whole matter to him and taking no part therein. He paid her the monthly allowance provided by the will for eleven months, taking receipts therefor reciting that the payments were under the will. Neither the son nor the attorneys informed her that she had the right to renounce the will and she was ignorant of the law. Nearly a year after her husband's death she first learned of her right to renounce the will and at once executed and filed her renunciation to take under the will. She and testator's infant daughter, of whom the will appointed her guardian, continued to reside in the homestead where they were living when the cause was tried in the circuit court. After her renunciation was filed the monthly allowance was paid to her for a year and she receipted

for these payments as being "on account of her share of the income of said estate." She also received household goods appraised at \$445. In addition to the payments to the widow, no part of the personalty was distributed except the payments to testator's mother and an allowance to the daughter made under order of the probate court. The entire personal estate, less the above mentioned payment, was in the hands of the executors. There was no evidence that either of the children had acted upon or been prejudiced by the fact that the widow had received the monthly payments. *Held*, (1) That the widow had the right to occupy the homestead rent free until her dower was assigned and her occupancy was passive and no more indicative of claim under the will than under the right of quarantine; (2) That she was entitled absolutely without election on her part, to a child's share of the personal estate, in this case one-fourth or approximately \$40,000; (3) That all of her acts having been done in ignorance of her legal rights and she having renounced the will within the time and in the manner required by the statutes, and the other parties interested in the estate not having been prejudiced by what she had done, she was not estopped to renounce the will and was not to be held as having elected to take under it. [GRAVES, ELDER and J. T. BLAIR, JJ., dissenting.]

2. ———: ———: ———: **Bequest of Personalty.** A bequest of personalty to a widow does not bar her dower in real estate; yet, if the bequest be in lieu of dower, she cannot accept the bequest and also her dower, but is put to her election.
3. ———: ———: ———: **Stare Decisis.** The question raised by the appeal in this case has been settled by repeated decisions of the Supreme Court, which have now become a rule of property, the adherence to which is indispensable to the due administration of justice.

Appeal from St. Louis City Circuit Court.—*Hon. Rhodes E. Cave*, Judge.

AFFIRMED.

Elliott W. Major, Charles G. Revelle and Lambert E. Walther for appellants.

(1) The acts of the widow under the will, such acts being inconsistent with any other theory. *Moseley v. Bogy*, 272 Mo. 319; *Davidson v. Davis*, 86 Mo. 440; *Mendenhall v. Mendenhall*, 53 N. C. 287; *Allen v. Allen*, 121 N. C. 328; *Treadway v. Payne*, 127 N. C. 436; *State*

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ex rel. v. Holtkamp, 185 S. W. 204, 205; Syme v. Badger, 92 N. C. 706; Wood v. Trust Co., 265 Mo. 511; Stoepler v. Silberberg, 220 Mo. 271; Casles v. Gray, 159 Mo. 595; Young v. Boardman, 79 Mo. 186; Stone v. Cook, 179 Mo. 537; Fox v. Wendles, 127 Mo. 511; Brant's Will, 40 Mo. 276, 64 L. R. A. 287. (2) When one is put to an election between two inconsistent courses and first adopts one by some act inconsistent with the other, such is an election which cannot afterwards be recalled. Stone v. Cook, 179 Mo. 534; Moseley v. Bogy, 272 Mo. 329; Ashlock v. Ashlock, 52 Iowa, 322; Mitchell v. Vest, 136 N. W. 1054. (3) Entirely without regard to the question of her election by acts her conduct in occupying the mansion which was of much greater value than her homestead rights and in accepting the bequest of \$200 per month to which she was not entitled except under the will, and her various other acts which led others to believe that she had accepted the will estops her from renouncing and rejecting the same. Zook v. Welte, 156 Mo. App. 714; Lackland v. Stevenson, 54 Mo. 108; Hart v. Giles, 67 Mo. 175; Wood v. Trust Co., 265 Mo. 511; 1 Woerner's Am. Law of Adm. (2 Ed.) 500; Stone v. Cook, 179 Mo. 534. (4) The widow at all times had full knowledge of the value of the estate and of what the will gave her and, so knowing, performed the acts above recited. She at no time complained of the nature or extent of the provisions made for her by the will and indicated no dissatisfaction therewith until more than eleven months thereafter. She was a woman of intelligence and business qualifications. She knew that reputable attorneys had been employed to advise her and her co-executor upon all legal matters, and she had ready access to them as well as to the probate court and others from whom she could have received legal information. Her alleged lack of legal knowledge and information cannot operate to recall an election theretofore clearly made. Light v. Light, 21 Pa. St. 407; Woerner, Law of Admin. (2 Ed.) sec. 119, p. 269; Moseley v. Bogy,

272 Mo. 333; Underhill on Wills, sec. 731. (5) The statutory provisions that a testamentary gift by a husband to his wife of an interest in real estate shall be in lieu of dower unless otherwise declared by the will, and that in such case the widow shall not be endowed in any real estate of the husband unless she shall within the time and in the manner prescribed by the statute refuse to accept the provisions made for her by the will, have no application to the personal estate. Halbert v. Halbert, 19 Mo. 453; Pemberton v. Pemberton, 29 Mo. 408; Bryant v. Christian, 58 Mo. 103; Glenn v. Gunn, 88 Mo. App. 429. (6) By Sec. 349, R. S. 1909, when a husband dies leaving a child or children or other decendants, the widow is entitled absolutely to a share in the personal estate belonging to the husband at the time of his death, equal to the share of a child of such deceased husband. If the husband makes a different provision for his wife by will, she is put to her election, but there is no statute fixing the time or manner of signifying her election. Hayden's Admr. v. Hayden's Admr., 23 Mo. 398; Glenn v. Gunn, 88 Mo. App. 429. (7) Acceptance by the widow of the provisions of her husband's will in her favor will defeat her statutory or so-called dower right in the personalty when, as in this case, such provisions are inconsistent with her enjoyment of that right. Schwatken v. Daudt, 53 Mo. App. 1. (8) Acceptance of a part of the benefit under a will constitutes an acceptance of the whole will. Wood v. Trust Co., 265 Mo. 511; 40 Cyc. 1895; State ex rel. v. Holtcamp, 185 S. W. 204.

Geo. W. Lubke and Geo. W. Lubke, Jr. for respondent.

(1) Every widow is given by statute the right to renounce the provisions made for her by the will of her husband. R. S. 1909, sec. 361. (2) No act on the part of the widow, however solemn and formal, during the period within which she may renounce the provisions of the will, prevents her from renouncing the will, if she

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so chooses. *Bretz v. Matney*, 60 Mo. 444; *Register v. Hensley*, 70 Mo. 189; *Spratt v. Lawson*, 176 Mo. 175; *Eggers v. Eggers*, 225 Mo. 116; *Orchard v. Stove Co.*, 264 Mo. 554. (3) Causing her husband's will to be probated and acting as executrix thereunder does not deprive the widow of her right to renounce the provisions made in the will for her. *Simonton v. Houston*, 78 N. C. 408; *In re Gwin*, 77 Cal. 314; *In re Smith*, 108 Cal. 121; *In re Frey*, 62 Cal. 661; *Tyler v. Wheeler*, 160 Mass. 206; *Reeves v. Garrett*, 34 Ala. 558; *Benedict v. Wils-marth*, 46 Fla. 536; *In re Estate of Proctor*, 103 Iowa, 232; *Milner v. Davis*, 120 Iowa, 231; *Williamson v. Boul*, 184 N. Y. 605; *Pace v. Pace*, 271 Ill. 114; *Whitridge v. Parkhurst*, 20 Md. 62; *Taylor v. Brown*, 2 Leigh (Va.) 419; *Cameron v. Cameron*, Ohio Probate, 157. (4) The occupation by the widow of the homestead cannot be regarded as an acceptance of the provisions of her husband's will because the statute secures to her the right to occupy the same until her dower is assigned or she elects to take a child's part of the estate. R. S. 1909, sec. 366; *Roberts v. Nelson*, 86 Mo. 21; *Wigley v. Beauchamp*, 51 Mo. 544; *Keene v. McVoy*, 206 Mo. 42. (5) No election made by the widow is binding on her unless made with full knowledge of the circumstances and of her rights and with the intention of making an election. *Payton v. Bowen*, 14 R. I. 375; *Milliken v. Milliken*, 37 Ohio St. 460; *Woodburn's Estate*, 138 Pa. St. 606; *Gam v. Gam*, 135 Ind. 687; *Hill v. Hill*, 88 Ga. 612; *Stone v. Vandermark*, 146 Ill. 312; *Yorkey v. Stinson*, 97 N. C. 230; *Wagner v. Wagner*, 111 Va. 326; *Owens v. Andrews*, 17 N. M. 597, 49 L. R. A. (N. S.) 1072; *Watson v. Watson*, 128 Mass. 152; 1 *Woerner on Admin.* (2 Ed.) sec. 119. (6) The property received by the widow under the provisions of the will being much less than that she would have the right to take under the law without reference to the will, the doctrine of election has no application to the facts in the case at bar. *Burgess v. Bowles*, 99 Mo. 548; *Ball v. Ball*, 165 Mo. 327. (7) The acts of the widow to the time of filing her renunciation of the provisions of

the will for her constitute no estoppel, because: first, she acted in ignorance of her legal right to renounce the provisions of the will, and second, no one interested in the estate of the deceased has acted on her conduct to his detriment. *Garesche v. Inv. Co.*, 146 Mo. 451; *Herman on Estoppel*, sec. 1062; *Spratt v. Lawson*, 176 Mo. 179; *Egger v. Egger*, 225 Mo. 145.

HIGBEE, J.—William F. Goessling died October 1, 1912, testate, leaving an estate of the value of about \$200,000, of which \$160,000 was personal property and \$40,000 real estate. His homestead was worth about \$14,000. He left surviving him three children by a former marriage, the appellants, and his widow, the respondent, who was forty-five years of age. By the first clause of his will, executed September 23, 1912, he directed that his debts be paid and that his executors take charge of all his property. The other provisions of the will are as follows: -

“Second. I will and direct to my dear wife, Wilhelmina M. Goessling, the use of the homestead, No. 2932 University Street, St. Louis, Missouri, and the sum of two hundred (200) dollars to be paid to her each month, out of my estate, during her life or so long as she may remain my widow. I also give and bequeath to her all of my household effects of whatever nature or kind.

“Third. I will and direct to my mother, Mrs. William Goessling, the sum of fifty (50) dollars, to be paid to her each month out of my estate.

“Fourth. I devise and bequeath to my three children, namely, Eleanora F. Peters, wife of Frank E. Peters, and Arthur C. Goessling, and Evelyn V. Goessling, all the rest and residue of my estate of any nature or kind, to be divided share and share alike.

“Fifth. I hereby request and appoint my dear wife, Wilhelmina M. Goessling, to act as guardian for my daughter, Evelyn V. Goessling, until she become of age.

“Sixth. I hereby appoint Frederick W. Goessling and Wilhelmina M. Goessling, my wife, as executors of this,

my last will, requesting that they be permitted to act without giving any bond.”

On October 10, 1912, Frederick W. Goessling and the widow presented the will for probate and made formal application for letters testamentary. Letters were granted and the executor and executrix qualified without bond.

A supplemental final settlement was filed June 17, 1915, showing a net balance of \$158,733.42, which was approved.

On the same day the three children of the testator filed a petition in the probate court praying an order of distribution in accordance with the terms of the will. This petition recites that the testator by the will gave to his widow \$200 per month and the use of the homestead property during her life or widowhood, also all the household property, and that there be paid to the testator's mother \$50 per month during her life; that the remainder of the estate was devised to his three children in equal shares. It further recites that the monthly payments to the widow of \$200 were made to and including October, 1914; that the widow duly qualified as executrix of the estate and with her coexecutor filed an inventory of the estate, and the semi-annual and final settlements; that she occupied the homestead which is of the value of \$13,000; that she has retained goods and chattels and the household furniture of the testator of the appraised value of \$975, and that by her acts aforesaid she elected to take under the will and did waive and estop herself from renouncing the will and the attempted renunciation of said will, filed by her September 25, 1913, is of no effect. Wherefore they pray that the remainder of said estate be distributed in equal parts to the petitioners, subject to the charge thereon of paying to the widow \$200 per month during life or widowhood, and \$50 per month to the mother of testator during life. On December 6, 1915, the probate court made an order that the executors pay to the widow \$2800 in payment of the monthly allowance of \$200 per month, under paragraph 2 of the will, for the months of October 1, 1914, to De-

ember 1, 1915, inclusive; \$50 per month to the mother of the testator for such period as she may not have been paid, and that the remainder of said property be turned over to the children of the testator as prayed, subject to the lien and charge as aforesaid.

From this order an appeal was taken to the circuit court where, on April 16, 1917, the judgment of the probate court was reversed and the cause remanded. An appeal was taken from this judgment. From the evidence it appears that Frederick W. Goessling was a man of affairs. He prepared and signed the inventory. Mrs. Goessling also signed it, by his direction. He personally attended to the administration of the estate, paid the widow her monthly allowance of \$200 for eleven months, taking receipts therefor reciting that the payments were under clause two of the will. He prepared the settlements which she also signed by his direction. He employed attorneys to advise and assist him in the administration. Mrs. Goessling took no part in this but left the administration of the estate wholly to the coexecutor. Neither he nor the attorneys informed Mrs. Goessling that she had the right to renounce the will. She was ignorant of the law. In September, 1913, she first learned that she had that right, and at once executed her renunciation to take under the will which was filed September 25, 1913. She and the infant daughter of the testator, who was sixteen at her father's death, continued to reside in the homestead where they were living at the time this cause was tried in the circuit court.

No part of the personalty of the deceased has been distributed except the payments of \$50 per month to the testator's mother, \$75 to his daughter Evelyn for her support and maintenance under the order of the probate court, and eleven payments of \$200 to the widow, receipted by her as being paid under the provisions of clause two of the will. She also receipted for payments of \$200 per month from October 1, 1913, to September 1, 1914, inclusive, same "being payment to the undersigned on account of her share of the income of said estate." She also

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received the household goods appraised at \$445. These are the conceded, undisputed facts. There is no evidence that either of the children have acted upon the fact that the widow received the monthly payments of \$200 or have been prejudiced thereby. The entire personal estate, less the payments above mentioned, is in the hands of the executors.

I. The statute gives the widow of the testator, without election on her part, a homestead of the value of \$3000. Under Section 334, Revised Statutes 1919, she is entitled to occupy the entire premises until dower is assigned "without being liable to pay any rent for same." [Ball v. Ball, 165 Mo. 312.] Under Section 319, Revised Statutes 1919, she is also entitled absolutely, without election on her part, to a child's part of the personal estate. Her share of the personal estate would be one-fourth, or approximately \$40,000. In addition to this she is entitled to the household and kitchen furniture not to exceed \$500 at its appraised value. [Section 105, R. S. 1919.]

Wills:
Widow:
Statutory
Rights.

By Section 328, Revised Statutes 1919, "if any testator shall, by will, pass any real estate to his wife, such devise shall be in lieu of dower . . . unless the testator, by his will, otherwise declared." By Section 329, Revised Statutes 1919, it is provided, "that in such case the wife shall not be endowed in any of the real estate whereof her husband died seized unless she shall by writing duly executed and acknowledged . . . and filed in the office in which the will is probated and recorded within twelve months after the proof of the will, not accept the provisions of said will."

II. It is contended by the appellants that the occupation of the homestead by the widow was an election to accept the provisions of the will for the reason that the homestead was of the value of \$14,000 and largely in excess of the value she was entitled to take under the statute on homesteads. [Sec. 5857, R. S. 1919.] Her occupancy was passive; no more indicative of a claim under the will

Occupying
Homestead:
Election.

than under her right of quarantine. Under the will she is vested with an estate for life in the homestead, subject only to be defeated by her remarriage. It must therefore be clear that the will passed an interest in real estate to the widow of the testator.

It is also contended that by proving the will, making application for letters testamentary and by receiving the payments of the monthly allowances, the widow definitely elected to take under the will and waived her right of renunciation. These questions may be considered together.

III. In support of their contentions, appellants' counsel rely on the following adjudications:

In *Moseley v. Bogy*, 272 Mo. 319, the wife of Bernard P. Bogy devised her real and personal estate, one-half to her husband and one-half to her two children. He probated the will and qualified as executor. The plaintiff, a daughter of the testatrix, sued her father in ejectment for an undivided one-fourth part of the property devised by the will. In his answer the defendant claimed possession by virtue of his curtesy. He also claimed an undivided half under the will. (1. c. 329.) He had a choice between two alternatives. Entitled to one or the other, he claimed both. We quote from page 331:

"He had full knowledge of his rights. He knew what the law would give him independent of the will. Having that knowledge he deliberately chose to put the will into effect, declaring that he would execute its provisions; therefore he elected to take under it."

[*Davidson v. Davis*, 86 Mo. 440.] Charles Rossin died in 1874, having devised to his wife, Mahala, eighty acres in fee, a life estate in one hundred acres and all his personal property. To others he devised other tracts of land. They had no children. His wife was appointed executrix. She probated the will, qualified as executrix and continued to reside on the premises in controversy. She took all the personal estate of her husband under his will, a provision greater than that allowed by law. She died within a year without having repudiated the will.

Plaintiffs endeavored to do this in her stead. "Conceding that the above recited acts would not have precluded her from withdrawing such acceptance and asserting her right to a homestead, if she had lived, yet her acceptance of the provisions of the will cannot be withdrawn by her heirs. It is not a right transmissible by descent." (414)

[Wood v. Trust Co., 265 Mo. 511.] Charles E. Wood resided in Washington, D. C. He died in February, 1908, without issue. By his will he gave to his wife \$35,000 in cash and the income of \$200,000 during her life. He also gave her in fee his residence property in Washington and all furniture, goods and chattels therein; also the rents of certain properties in Lebanon, Ohio, with power to dispose of them by will. The will was probated in the District of Columbia on May 28, 1908. On March 15, 1911, an authenticated copy of the will and of the probate thereof was filed and recorded in the probate court of Jasper County, Missouri, and in the recorder's office of that county. Plaintiff, the widow, never filed a renunciation of the will but accepted all of its provisions. On September 9, 1911, she filed her election in the probate court of Jasper County to take one-half of the real estate of her husband in this state. This action was to recover dower in real estate located at Joplin. Syllabus 1 reads:

"The statute of the District of Columbia and the statute of Missouri are substantially alike in providing that where property is devised by will to the wife it shall be in lieu of dower, and in declaring that unless she renounces the will within a stated time she shall be deemed to elect to take the property given her by the will and to surrender her statutory dower; and a widow, without children or other descendants, whose husband's will gave her certain real estate in Washington, D. C., and a designated amount of money, who did not renounce the will probated in that city, is not entitled to claim one-half or any other interest in his real estate in Missouri, although she filed with the proper probate court in this State her election not to take under the will, and the will did not expressly say the devise and bequests to her were to be in lieu of dower."

In *Stoepler v. Silberberg*, 220 Mo. 258, Bernard Stoepler, who died in 1867, owned the property in controversy as his homestead. By his will he devised the homestead to his widow for life, with remainder to his three children, two of whom died without issue. The widow, who was named executrix, probated the will and took out letters testamentary. She died without having renounced the will, but accepted it and always asserted that she owned a life estate only. It exceeded by \$1500 the value of the homestead she was entitled to receive. She also received the personal estate. Judge GANTT, at page 271, said:

"In this case the widow accepted the provisions of the will, qualified as executrix and on various occasions announced she only had a life estate in this lot. Her heirs could not now withdraw her acceptance. The right of election is not transmissible by descent. [*Welch v. Anderson*, 28 Mo. l. c. 298; *Davidson v. Davis*, 86 Mo. l. c. 444.]"

Stone v. Cook, 179 Mo. 534, was an action by one of the legatees, a daughter of the testator, to contest her father's will after she had received \$7000 from the executors. The rule was stated by Judge MARSHALL, at page 546, as follows:

"The sum of the matter then is, that as a general rule one who has received a benefit under a deed, will, or other instrument cannot thereafter contest its validity, but the general rule is subject to this qualification, that if the benefit was received without a knowledge of his right to elect between the benefit so conferred and of his right to the property outside of the deed, will or instrument, or if he was induced by fraud or deception to accept the benefit conferred by the instrument, he may revoke the election and contest the validity of the instrument and claim under the law, provided that innocent third persons will not suffer by a revocation, and provided there has been no unreasonable delay in exercising the right of revocation, and provided he pay into court the benefits received."

It is apparent that the rulings in these cases afford no support to the appellants' contentions. Mrs. Goessling

was ignorant of her right to renounce the will. It is true she occupied the homestead but she had that right under the statute. She received eleven payments of the monthly installments, but under the statute one-fourth of the personal estate was her absolute property. No one has been injured or prejudiced by anything she did. That is an essential element of estoppel. She can be charged with all payments when distribution is made. The statute, recognizes her ignorance of the law, although a *feme sole*, and allowed her one year in which to renounce the will. Every one dealing with her is presumed to have known she had that privilege and to have acted with reference to that contingency.

IV. We have not had our attention called to a case decided by this court in which, under similar circumstances, it is held that a widow was estopped to assert this statutory privilege. On the contrary, all the adjudications in this State uphold her right to renounce the will at any time within a year after probate. To deny this because a widow is a *feme sole* and *sui juris* would emasculate the statute. This is the general rule. —: —: —: **Estoppel.** [40 Cyc. 1897, citing *Stone v. Cook*, supra.]

If a person, although knowing the facts, has acted in misapprehension of his legal rights and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed. [*Watson v. Watson*, 128 Mass. 152.] It is otherwise, however, where the position of other parties has materially changed. [*Utermehle v. Norment*, 197 U. S. 40.]

Watson v. Watson, 28 Mo. 300, is a leading case. On June 26, 1857, letters of administration were issued on the estate of Ringrose J. Watson. On September 18, 1857, Frances Watson, his widow, elected to take a child's part in lieu of dower. Prior to this the widow had sued to recover dower, one-third part of the land owned by her husband at his death, "the same being the kind of dower which she hereby elects to take in the land." Having made the election above mentioned, she filed an amended petition in which she claimed dower according to said

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election, alleging that at the time of filing her original petition she was ignorant of her true rights and interests in the premises and had been misinformed as to them by an attorney at law whom she consulted. The defense was that the widow was concluded by the election she had made in her original petition and that a subsequent election was of no effect, she having already made one. Of this opinion was the court and gave judgment accordingly. The judgment was reversed in an opinion by Judge SCOTT, in which all concurred.

The headnotes read as follows:

"1. To entitle a widow to dower under the first section of the dower act (R. C. 1855, p. 668) it is not necessary that she should elect so to take. No election to take dower under the first section of the act can, as an election, take away her right to elect to be endowed under the eleventh section of said act. To overthrow this right, there must be a binding contract or such facts and circumstances as will work an estoppel *in pais*.

"2. The institution of a suit by a widow to recover dower according to the first section of the dower act, and the declaration in the petition in such suit, which is signed and sworn to by her, that she thereby elects to take as her dower the third part of the lands of the deceased husband, will not take away her right to elect, within eighteen months after the grant of letters testamentary or of administration, to take dower under the eleventh section of said dower act."

The ruling on this point in *Watson v. Watson* was expressly approved by Court in *Banc* in *Keeney v. McVoy*, 206 Mo. 42, l. c. 56. In the case last mentioned, at page 54, Judge LAMM said:

"We do not take as sound the proposition . . . that the mere passive enjoyment of her quarantine right by living under the roof and by the fireside of her husband's mansion house and partaking of her husband's plantation (all of which the law says she may do and have until her dower is assigned or she elects to take

a child's part) fixes her status as a common-law dowress and defeats her right to take a child's part. Such holding would breed confusion and perplexity. Whenever our Legislature intends such signal and drastic results shall follow her passive acceptance of the law's bounty for a month, a year, a lustrum or a decade or even two (as here) it must say so with an *aye* that is *aye* and a *nay* that is *nay*, so that its intendment is not in doubt; for as long as courts are left to inference in solving doubts, they will be solved in favor of a widow's full dower rights."

In *Bretz v. Matney*, 60 Mo. 444, the widow filed with the probate judge a formal, unqualified acceptance of the provisions made for her in her husband's will. Within the year she filed her renunciation: Judge NAR-
TON, speaking for the whole court, on page 448, said:

"Our law says, the widow shall be presumed to acquiesce in her husband's will, unless within twelve months after its probate she chooses to renounce. The year is given her to renounce, for reasons which are obvious. *Her acceptance, however repeated, amounts to nothing.* She has a year within which to make up her final intention, and there is nothing in our statute to deprive her of this right. . . .

"And the case of *Light v. Light* (21 Penn. St. 413), is referred to as supporting the position that an election by a widow to take under the will of her husband is an estoppel against her claiming dower, and that such election is binding on her, there being no fraud.

"We do not assume to controvert the propriety of these decisions under the statutes of the states where they were made, but our statute gives the widow twelve months within which she can reject her husband's will, and requires no formal election between the will and the law; and, we suppose, she is entitled to the twelve months allowed her by statute, *although she may formally accept the will every day in the year previous to the last.* Such acceptance is purely voluntary, and made within the period during which our statute holds her irresponsible for her acts.

"Nor can the will of the husband impose an obligation which the law does not impose. Our statute is designed to confer privileges on widows denied to men; and these privileges are conferred to prevent impositions upon them through their *ignorance of law* or the promptings of impulsive affection.

"The case in Pennsylvania seems to be based on the maxim that *ignorantia legis neminem excusat*; but this maxim our statute *ignores or suspends, in regard to widows, for a definite period after the death of their husbands.*"

This case was affirmed in *Register v. Hensley*, 70 Mo. 189.

In *Spratt v. Lawson*, 176 Mo. 175, the husband bequeathed to his wife a legacy of \$7000 to be paid to her in seven installments. She formally endorsed on the will her acceptance of this devise in lieu of dower and all other interest in her husband's estate. She accepted the first installment of \$1000. It was contended that, as she was a *feme sole* under the Married Woman's Act, her formal acceptance of the will and of the \$1000 estopped her from renouncing the will. The court, all concurring, held that all wills must be considered as made with reference to this statutory right of the wife, however solemn the wife's renunciation of its privileges at any time within the twelve months after the probate of the will.

In *Egger v. Egger*, 225 Mo. 116, the testator left an estate of the value of \$300,000. By his will he gave his widow \$75 per month. After the probate of the will the widow executed a formal acceptance thereof and afterwards received \$75 per month up to the first renunciation and prior to a second renunciation and also received the \$400 allowed to her by statute. It was held, following *Spratt v. Lawson*, *supra*, that these acts did not estop her from renouncing the will. It was further held that she could take a child's share in the personal estate without renouncing the will (page 140). In disposing of the plea of estoppel interposed as a de-

fense, the court says, at page 145: "As to the plea of estoppel, there is nothing to support it. The amounts that were paid to her were but a very small per cent of what was due her. The document she was induced to sign, dated January 9, 1902, declaring that she elected to accept the provisions of the will in lieu of dower was without any consideration at all, and it could not have misled the executor to his disadvantage."

GRAVES, WOODSON and LAMM, JJ., concurred in these rulings.

In *Orchard v. Store Co.*, 264 Mo. 554, in an opinion by Judge BOND, concurred in by all the members of Division One, the court followed *Egger v. Egger*, supra, holding that the widow takes the child's share in the personal estate without reference to the will.

It is thus seen by this long array of unbroken precedents that in the case of a devise made by a husband to his wife, she is immune from the ordinary rules of election, waiver and estoppel. "Our statute is designed to confer privileges on widows denied to men; and these privileges are conferred to prevent impositions upon them through their ignorance of the law or the promptings of impulsive affection." [*Bretz v. Matney*, supra.] But the ordinary rules applicable to persons *sui juris*, insisted upon in the learned dissenting opinion, would fail in this case because, as said in *Garesche v. Levering Inv. Co.*, 146 Mo. 436, foot page 451:

"To constitute an estoppel it must appear that the party acted with full acknowledge of all the material facts and circumstances, and with knowledge of his legal rights, and that the position of the party invoking the doctrine would be changed if the matter was opened up." (Citing cases.)

The doctrine of election can have no application or relevancy, where, as in this case, the property received is less than the widow is entitled to under the statute without reference to any will. [*Burgess v. Bowles*, 99 Mo. 548; *Ball v. Ball*, 165 Mo. 327.]

Ludington v. Patton, 111 Wis. 208, 86 N. W. 571, is an instructive case. Governor Ludington left an estate worth

\$1,250,000 to trustees in trust for the benefit of his widow (her provision being less than one-fourth of her legal rights), and the balance to his six children by a former marriage. The trustees, who were the executors, offered, on behalf of the heirs, to increase the provision for her to one-half the value of her legal rights. Relying upon the trustees to treat her justly and believing that she was dependent upon the heirs for what she might obtain in excess of the provision in the will, she accepted it and signed the necessary paper to consummate the transaction, conveying her interest in the estate to the trustees, and a petition to probate the will. The contract was carried out for six years. In an action to set aside the contract, without offering to restore what she had received, it was held that the trustees held a fiduciary relation and that her failure to take her legal rights grew out of a mistake of law, relievable in a court of equity as readily as a mistake of fact. The analogy is obvious.

V. It is further contended by appellants that the statute authorizing a widow to renounce her husband's will has no application to bequests of personal property; hence it cannot avail the respondent in this appeal from the order

of distribution of the personal property. True

it is that a bequest of personal property to

—: —: a widow does not bar her dower in real estate.
—: Bequest of Personalty. [Halbert v. Halbert, 19 Mo. 453.] But if

the bequest be in lieu of dower the widow can-

not accept the bequest and also have dower. She is put to her election. [Pemberton v. Pemberton, 29 Mo. 408.] Appellants claim in their petition for an order of distribution that the respondent had occupied the homestead and accepted the \$200 monthly allowance under clause two of the will; hence the renunciation was of no effect and she was precluded from taking a child's part in the personal estate. Respondent cannot take partly under the will and partly under the statute. One who accepts a beneficial interest under a will thereby adopts the whole will. This was so held in Wood v. Trust Co., 365 Mo. 511, where the

widow took all the personal and real estate devised to her, and then claimed dower in land in Missouri. It was held that, not having renounced the will, she could claim nothing outside of its provisions. The respondent, having renounced the will, cannot be precluded by it from taking her share of the personal estate.

The question raised by this appeal has been settled by repeated decisions of this court. It has become a rule of property. The rule of *stare decisis* is founded on considerations of sound principles of public policy, it being indispensable to the due administration of justice. [15 Cyc. 916.] The judgment is affirmed.

Walker, C. J., Woodson and D. E. Blair, JJ., concur; Graves, J., dissents in separate opinion in which Elder, J., concurs; J. T. Blair, J., dissents.

GRAVES, J. (dissenting).—I dissent in this case, and for reasons which follow.

By the will she got, at least, an estate for years, in what is called the homestead place. This homestead place was worth much more than she could claim under the law. But this to my mind is a subsidiary question. The real question is, whether or not she elected to take under the will. If she did elect to take under the will then this action fails. My views on the question here involved, may be concisely stated. One who accepts the terms of a will and receives benefit under it, is estopped thereafter from denying or renouncing the will. This is horn-book law, or should be so considered. The rule, under existing laws, should apply to the widow, as well as any other beneficiary under a will. And further, whilst the widow has a given time in which to make her election, it should not be said that after she had in fact made such election (by acts or deed) that she can later disown that election, solely on the theory that she is not bound by any previous election, but can at the last day of the statutory period make a new election, and thereby over-throw what she had by her own acts, previously done. It is not really the doctrine of estoppel. It cuts

deeper than that, and turns upon the question as to whether or not she has, in fact, elected to take under the will. An election, once made, should stand, irrespective of the time it is made. Of course it could not be made until after the death of the testator, because there could be no election prior to such time.

It is true our cases have used some broad language as to the rights of a widow to elect. She is, or was, given twelve months in which to elect to take under the law, or under the will, but when she has elected, the matter is concluded. She can conclude this matter of election on the first day of her twelve months as well as on the last day, or any other day thereof. At this time she is *sui juris*, and entitled to no exemptions under the law. Her acts are just as binding upon her as the acts of any other *feme sole*, or of a man. She can estop herself both by contract and acts, just as any other citizen. She is presumed to know the law just as any other citizen is presumed to know. Her election is not changed, because of her alleged ignorance of the law. In the cases urged by respondent, it will be found that other matters determined the case. Thus in *Egger v. Egger*, 225 Mo. 116, there was a contract, and we ruled that the contract was without consideration. So, too, in *Spratt v. Lawson*, 176 Mo. 175, the wife at the writing of the will had endorsed thereon her acceptance thereof, and this becomes a matter of contract without consideration. Other cases cited are not more applicable. The case of *Mosely v. Bogy*, 272 Mo. 319, rules the instant case and cannot be distinguished. If that opinion is right the present is wrong. In that case we were dealing with a widower, in this with a widow—both equal under present laws.

I admit that there are broad expressions in some of our opinions to the effect that the widow has the full twelve months, and that although for eleven months, and twenty-nine days, she fully accepts the will, she can upon the last day, make another election and take under the law. In my judgment these loose expressions are wrong, and should be eliminated from the books. She can elect

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by acts as well as by deed, and should be bound as any other devisee in a will. And such election can be at the first of the statutory period as well as at the last. When so shown she is bound by the election, not by estoppel *in pais* but by the fact of an election. Whether she lost or won by the election is immaterial. The single question is, did she elect to take under the will, and not whether her acts which constituted the election resulted in injury to others. I dissent for these reasons, somewhat hurriedly expressed. *Elder, J.*, concurs in these views.

THE STATE ex rel. FORD et al. v. JAMES ELLISON
et al., Judges of Kansas City Court of Appeals.

In Banc, April 30, 1921.

1. **CERTIORARI TO COURT OF APPEALS: Conflict of Opinions: Scope of Review.** On *certiorari* to review an opinion of a Court of Appeals as being in conflict with a controlling decision of the Supreme Court, the question of conflict is to be determined from the opinion of the Court of Appeals; and correlative facts on which the Court of Appeals based its ruling are referred to only as aids in more clearly understanding the court's conclusions. (WOODSON, J., dissenting.)
2. ———: ———: **Public Improvements: Contract and Bond: Conformity to Ordinance.** A contract for constructing certain sewers required that the work should be begun within ten days after the contract became binding and should be prosecuted regularly and uninterruptedly with such force as to secure its full completion within ninety working days from the date of its confirmation, the time of beginning, rate of progress and time of completion being essential conditions of the contract. Compliance with this contract was secured by a bond whereby the surety agreed with the city that the contractor would well and faithfully perform the contract, the surety not being liable beyond a sum stated equal to the estimated cost of materials used and labor done on the work, and that if the work be not begun within ten days after the contract became binding and prosecuted as provided in the contract to full completion within ninety working days from its confirmation then the surety would pay the city four dollars per day as liquidated damages for such breach of the contract. *Held*, that

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the contract and bond complied with the ordinance providing for the work, which required the successful bidder to give a good and sufficient bond in a sum equal to the contract price for the construction of the sewer and laterals, "to be forfeited," if he should fail to complete the work under his contract within ninety days from the execution thereof. The Court of Appeals decision to the contrary and holding the tax bills issued for the cost of the work void for failure to give the bond required by the ordinance is quashed, as being in conflict with controlling decisions of the Supreme Court.

3. ———: ———: ———: ———: ———: **Forfeiture.** A city ordinance providing for the construction of sewers required the successful bidder to give a bond to secure performance of his contract, "to be forfeited" if he should fail to complete the work within ninety days from the execution of the contract. The bond as given provided that the surety should pay to the city a certain sum per day "as liquidated damages" for failure to so complete the work, not to exceed in the aggregate the estimated cost of the materials used and labor done on the work. *Held*, that the bond complied with the ordinance, inasmuch as the forfeiture required by the ordinance was not a penalty as in the criminal law, but merely a right in the city to a civil proceeding to recover from the contractor or his surety its damages at the stipulated amount per day for each day's default beyond the time limited in the bond.
4. ———: ———: ———: ———: ———: ———: **Damages.** The law is settled in this State, by numerous decisions of the Supreme Court, that, in suit upon penal bonds with collateral conditions, the obligee, upon breach of condition, is not entitled to judgment for the full penalty of the bond, when a less sum is actually due; and hence the obligor can discharge himself by paying what is really due with interest and costs and thereupon the cause is discontinued.

Certiorari.

RECORD QUASHED.

Craven & Bates for relator.

(1) The decision of the Kansas City Court of Appeals both in its literal language and by construction of its meaning is a holding that the bond contemplated by the city ordinance is a bond, the whole penalty of which would be forfeited if the work of constructing the sewer was not completed within ninety days, and in this re-

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spect is contrary to the following decisions of this court. *Burnside v. Wand*, 170 Mo. 531; *Burns v. Webster*, 16 Mo. 258; *St. Louis v. Parker-Washington Co.*, 271 Mo. 229; *Foundry Co. v. Const. Co.*, 200 Mo. App. 33; *Nichols-Shepard Co. v. Beyer*, 168 Mo. App. 693; *Light, Heat & Power Co. v. Independence*, 188 Mo. App. 157; *Buchanan v. Exposition Co.*, 245 Mo. 350; *Cochran v. Ry. Co.*, 113 Mo. 364; *Fidelity & Deposit Co. v. Schuchan*, 189 Mo. 468; *Wand v. Ryan*, 166 Mo. 646; *State to use v. Ruggles*, 20 Mo. 100. (2) The decision is a holding that the city council cannot vary the form of bond required by ordinance to protect the city where a contract is let for constructing a public improvement paid for by tax-bills and that the city cannot insert therein provision for liquidated damages and is contrary to the decision of the Supreme Court of this State. *St. Louis v. Von Phul*, 133 Mo. 567; *Heman v. Gillian*, 171 Mo. 258; *Sheehan v. Owens*, 82 Mo. 450. (3) The decision of the Court of Appeals holds that where an ordinance provides that the construction of the sewer must be completed within ninety days from the date of the contract for building the sewer and that a bond shall be given that will be forfeited if the sewer is not completed within time, and where the city then enters into a contract and bond contained in the same document both with provisos that the contractor shall be liable for liquidated damages if the work is not completed within the time specified—that in such case the tax-bills are not rendered void by the clause in the contract providing for liquidated damages but are so rendered by other clauses in the same document defining the liability of the bondsmen. In this holding a decision of the Court of Appeals is contrary to the decisions of this court in the case of: *Gist v. Const. Co.*, 244 Mo. 389; *Excelsior Springs v. Ettenson*, 120 Mo. App. 215.

Culver, Phillip & Voorhees for respondents.

WALKER, C. J.—*Certiorari* to quash the record of the Kansas City Court of Appeals. A judgment on certain

sewer tax-bills had been rendered in the circuit court in favor of relators and against the Excelsior Springs Light & Water Company. Upon an appeal this judgment was reversed by the Court of Appeals. Its rulings are alleged to contravene certain decisions of the Supreme Court. The core of the controversy is in the difference between the terms of the ordinance authorizing the work and those of the contract and bond for the faithful performance of same. This is, of course, to be determined from the opinion; correlative facts on which the Court of Appeals bases its ruling are referred to only as aids in more clearly understanding the Court's conclusions.

The ordinance, so far as concerns the matter at issue, provides that the "successful bidder shall give a good and sufficient bond in a sum equal to the contract price for the construction of the sewer and laterals, to be forfeited if he shall fail to complete the work of constructing the said district sewer and laterals under his contract within ninety days from the execution thereof."

The contract provides that: "6. The work embraced in this contract shall be begun within ten days after the contract binds and takes effect and shall be prosecuted regularly and uninterruptedly thereafter with such force as to secure the full completion within ninety working days from the date of its confirmation, and the time of beginning, rate of progress and time of completion being essential conditions to this contract. And if the contractor shall fail to complete the work within the time above specified, an amount equal to the sum of four and no/100 dollars per day for each and every day thereafter, until such completion, shall be deducted as liquidated damages for such breach of this contract from the amount of the final estimate of said work."

The bond, which is embodied in the contract, wherein the contractors were the parties of the first part, a liability company, as surety, was the party of the second part, and the City of Excelsior Springs was party of the third part, is, so far as relevant here, as follows:

"Said party of the second part hereby guarantees that the said party of the first part will well and truly perform the covenants hereinbefore contained; to pay for the work and all labor of all laborers and teamsters, teams and wagons, employed on the work, and for all materials used therein or any part thereof which shall not be paid for by said first party within ten days after the money for such work, labor and materials becomes due and payable, and this provision shall entitle any or all laborers and teamsters and owners of teams and wagons who may do work, and parties who may furnish materials on or for the improvements to be done under this contract, to sue and recover from the said second party, by said first party; but said second party shall not be liable on this guarantee on account of materials used and labor done upon said work beyond the sum of thirty-four hundred forty and 25/100 (\$3,440.25) dollars, the estimated costs of materials used and labor done upon said work. And the said party of the second part hereby agrees with the city of Excelsior Springs that the said party of the first part will well and faithfully perform each and all of the terms and stipulations in the foregoing contract to be done, kept and performed on the part of the said first party, but said party of the second part shall not be liable hereon beyond the sum of thirty-four hundred forty and 25/100 (\$3,440.25) dollars.

"And the said party of the second part hereby further agrees with the city of Excelsior Springs, that if the work embraced in the contract be not begun within ten days after this contract binds and takes effect, and prosecuted regularly and uninterruptedly, thereafter in accordance with the terms and provisions thereof with such force as to secure its full completion within ninety working days from the date of its confirmation, they will pay to the city of Excelsior Springs the sum of four and no/100 dollars per day, as liquidated damages for such breach of this contract."

More briefly stated, under the ordinance it is provided in general terms that a forfeiture of the bond is

to follow a failure to perform the work within the time stipulated; while, under the contract, of which the bond is a part, the provisions as to the forfeiture are specifically stated in that the liability company as surety for the contractors binds itself to hold the city of Excelsior Springs harmless from all the defaults of the contractors therein specified, in a sum not exceeding the total contract price, except as to the time within which the work is to be performed; as to this, if the limitation is exceeded, for each day the contractors are in default the surety agrees to pay the city of Excelsior Springs four dollars as liquidated damages.

The work contemplated was completed within the time stipulated and in other respects it met the full measure of the contractors' obligation. There is no ground for complaint, therefore, arising between the contracting parties. The malcontent in the original action whose rights the Court of Appeals attempted to determine was a local corporation which refused to pay its proportionate part of the expense incurred in this undertaking, which expense was levied in the form of sewer tax-bills. The improvement effected was one of public necessity, uniformly recognized in all centers of population as promotive of health. While this fact should not and will not control in the interpretation of the Court of Appeals opinion, other than as authorized by its unmistakable terms, the nature of the transaction cannot but cause the reviewer to look upon it with no unkindly eye and to scrutinize with discriminating care any construction the result of which will be to destroy the benevolent purpose intended. This does not mean that the rights of individuals are to be disregarded, but that a wise discretion such as is always present when the law is properly administered, shall be exercised in determining the limit of their protection, which should not be extended except in the presence of an unfair burden illegally imposed.

The portions of the opinion immediately pertinent to the matter at issue are as follows:

"The contractor gave a bond in the sum of the contract price, but it did not provide that it should be forfeited if the work was not completed within ninety working days, but it provided that if it was not completed within that time \$4 per day should be paid to the city as liquidated damages for each day over the ninety days that the work was not completed. . . . But we think there is merit in the contention that there was no bond given that the work should be completed within ninety days, and that if the work was not completed within that time the bond should be forfeited. The provisions of the bond were that it should not be forfeited, but that only \$4 per day should be paid for each working day that the work was not completed after ninety days. The council passing the ordinances authorizing the work regarded it as material that the work should be completed within ninety days, and in order to be assured that the work would be completed in that time provided that a bond should be given to that effect, and if the work was not so completed the bond should be forfeited."

I. Under the issue presented we are concerned only with the part of the bond to which the foregoing excerpt refers. The other parts are in compliance with the general law regulating contracts for public work. [Sec. 1247, R. S. 1909, sec. 1040, R. S. 1919.] A right of action

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Contract and Bond:
Conformity to Ordinance.

for a breach of either of these is not affected by the presence of the others in the instrument; the validity of either is to be determined by its own terms. If those terms are in substantial compliance with the law in that they contravene no statute, are not in violation of public policy and import a valid consideration, their variance in verbiage from the statute or ordinance upon which they are based will not render the obligation nugatory and hence militate against its enforcement. [State ex rel. Fisher v. Rodecker, 145 Mo. 450; State ex rel. Lafayette Co. v. O'Gorman, 75 Mo. 1. c. 378; State ex rel. West v. Thompson, 49 Mo.

l. c. 189; Gathwright v. Callaway County, 10 Mo. 664; Grant v. Brotherton's Admr., 7 Mo. 458; Barrett v. Stoddard County, 183 S. W. l. c. 647.] It is the subject-matter as indicative of the purpose and not the mere form that the court looks to in construing the terms of an obligation as at bar. [Henry County v. Salmon, 201 Mo. l. c. 152; Wimpey v. Evans, 84 Mo. 144; State ex rel. McKown v. Williams, 77 Mo. l. c. 470; Newton v. Cox, 76 Mo. l. c. 354; Flint ex rel. v. Young, 70 Mo. l. c. 225; State to use Cameron v. Berry, 12 Mo. 377.] Here the validity of the bond is assailed not on account of its different conditions but its variance from the ordinance which it is contended is such as to make the entire obligation void. This conclusion does not follow, even if it be conceded that the condition as to the time limit of performance is invalid. The binding obligations of the other conditions would not thereby be affected authorized as they are by the statute and drawn in conformity therewith. In ruling therefore as to the invalidity of the entire bond by reason of the alleged variance of one of the conditions from the tenor of the ordinance, the Court of Appeals either inadvertently or otherwise ignores the other conditions, and in so doing contravenes the cases above cited. However, giving immediate consideration to the condition in controversy, there is no such variance between it and the ordinance as to affect the obligations of the bond. For immediate reference we repeat that the ordinance authorizes a forfeiture of the bond upon a failure to perform the work within ninety days, while the bond prescribes that the work shall be begun within ten days after the execution of the contract and prosecuted with such force as to secure its completion within ninety days; and if not so completed the contractors and surety will pay to the city of Excelsior Springs four dollars per day for each day's default. From this it will be seen, without quibbling with words in attempting to make more clear that which is already clear, that the mandatory obligation of the bond as to the time of the completion of the work is the same in effect as that of the ordinance.

II. The only remaining ground for controversy is what is meant by a forfeiture of the bond. The meaning of similar terms in statutes and ordinances as defined in the rulings of courts of last resort in other jurisdictions, while not determinative of the question of the **Bond: Forfeiture.** contravention of opinions here involved, are not inappropriately cited to show that the current of authority is uniform on this subject, and, as we will show, is in accord with our own rulings. In *United States v. Distillery at Spring Valley*, 25 Fed. Cases, 854, the court said the words "shall forfeit as used in the Act of Congress, March 31, 1868 (15 Stat. 59), declaring that a distiller operating without a license shall forfeit his distillery and distilling apparatus, means that they shall be subject to forfeiture."

The Supreme Court of Vermont in *Woodcock v. Bolster*, 35 Vt. 632, held that where the word forfeit is used it is usually construed to mean a cause of forfeiture requiring some judicial proceeding to effect it.

The Court of Appeals of Indiana in *Barber-Asphalt Co. v. City of Wabash*, 43 Ind. App. 167, held that when a contract for the improvement of a city street provided for its completion at a certain date and for a failure the contractor was to pay a forfeit of \$25 per day as liquidated damages until the completion of the work, that while the word forfeit usually means a penalty the damages will be considered liquidated regardless of whether the city suffered actual damages.

The Supreme Court of Texas in *Galveston Ry. v. State*, 81 Tex. 572, in construing a statute of that State (Sec. 4280, R. S. Tex.) which provides that if a railroad company fails to file its annual report it shall forfeit its charter, was intended to prescribe the ground of forfeiture which the state could enforce by a judicial proceeding.

Under our own rulings and those of the Courts of Appeals the word forfeit as used in criminal law is equivalent to a fine; but when used in a civil proceeding in connection with the enforcement of a civil right it

contemplates an ordinary civil judgment, having nothing peculiar in its nature. [State ex rel. Stinger v. Kruger, 280 Mo. 293; Edwards v. Brown, 67 Mo. 377; Ex parte Alexander, 39 Mo. App. 1. c. 109; Greene County to use v. Wilhite, 29 Mo. App. 1. c. 466.] The language of the ordinance, therefore, in requiring a forfeiture of the bond upon a failure of the contractor to comply with the prescribed time limit in the completion of the work was not employed in the strict sense of a penalty as in criminal law, but in a definitive manner to afford the city the right to a civil proceeding to recover from the contractor or his surety the stipulated amount per day for each day's default beyond the time limited in the bond.

While it would have been a loose and irregular manner for a municipality to have contracted for public work in simply requiring a bond in the general language of an ordinance, the right of action on such an obligation would have differed in no material particular from that authorized under the present bond except as to the manner of determining damages. In the one case the right of recovery would have been limited to proof of the damages actually sustained, while in the other that right would have been measured by the number of days the contractor was in default, the sum stipulated as a penalty to be taken as a unit in estimating the total. Under either there would have been such a forfeiture of the bond as is meant by the ordinance and is authorized by law but not such as is held to have been required by the Court of Appeals opinion. Ordinances authorizing work of the character here under review are usually couched in general terms, leaving the conditions of the contract and bond to be specified by the parties. The necessities of the case demand this latitude in the effective discharge of the duties devolving upon municipal authorities in the letting of public work whose rights and powers in regard thereto are not limited to those expressly granted but include such implied powers as are necessary to carry into full force and effect those expressly granted. As was well said in *City St. Louis v.*

Von Phul, 133 Mo. 567: "The power to make improvements and to let contracts therefor and to exact of the contractor a bond for the faithful performance of his contract, necessarily implies the power to do everything necessary for the faithful performance of the work, for the protection of the city and its citizens, and for the securing of the best and lowest possible bids. Indeed, we are unable to conceive of any matter of detail incident to the contract and the work that the city might not require that a private person could require."

In ruling, therefore, that the bond given illegally extended the powers granted the municipal authorities under the ordinance and thus prevented competitive bidding for the work, the Court of Appeals ran counter to the Von Phul and other cases of like character.

III. It is difficult to determine from the opinion of the Court of Appeals what is held therein to be the limit of the obligee's right of recovery upon a breach of the condition of a bond drawn in the language of the ordinance alone. We have shown that if it be meant

Damages. by this ruling that such right is to be limited to a recovery of the actual damages sustained, an adequate remedy is afforded by the bond given; and, hence, the contention as to the invalidity of same must go for naught.

If, however, it is meant that the obligee is to be entitled to a different right of recovery, the ruling is in direct conflict with numerous decisions of this court. [State ex rel. Cochran v. Cooper, 79 Mo. l. c. 467; State to use Gates v. Fitzpatrick, 64 Mo. 185; State to use Reyburn v. Ruggles, 20 Mo. 99.] The rule has never been recognized in this State that the obligee upon the breach of a condition was entitled to a judgment for the full penalty of a bond when a less sum was actually due. As was said in Burnside v. Wand, 170 Mo. l. c. 560: "Our law is opposed to forfeitures. It has ever been considered unconscionable to demand the full penalty when a lesser sum is actually due. Hence, it has ever been the law in our State that in suits upon penal bonds the

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obligor can discharge himself by paying what is really due with interest and cost, and thereupon the cause is discontinued."

IV. Summarizing what has heretofore been said: the rule announced in *Barber-Asphalt Co. v. Munn*, 185 Mo. 552, and other cases declaratory of the same doctrine, as to the supervening control of an ordinance in determining the time within which the work is to be performed can have no application here. The time limit in the contract and bond was identical with that prescribed in the ordinance. Furthermore, the language of the ordinance being general, the provision in the contract and bond defining the manner in which the damages were to be determined did not exceed the implied power of the municipal authorities in contracting for the performance of the work but constituted a wise and necessary exercise of same. The rule limiting the powers of municipalities in contracting for public work to the terms of ordinances applies only when the latter contain specific provisions in regard to the work contracted for and necessary to secure its performance as exemplified in *State v. Butler*, 178 Mo. 272; *Heman Const. Co. v. Lyon*, 277 Mo. 628.

From all of which the conclusion is authorized that the opinion of the Court of Appeals contravenes decisions of this court in the particulars stated and that its record should be quashed. It is so ordered. All concur except *Woodson, J.*, who dissents in separate opinion.

WOODSON, J. (dissenting).—The majority opinion states that: "A judgment in certain sewer tax-bills had been rendered in the circuit court in favor of relators against the Excelsior Springs Light & Water Co. Upon appeal this judgment was reversed by the Court of Appeals. Its rulings are alleged to contravene certain decisions of the Supreme Court. The core of the controversy is in the difference between the terms of the ordinance authorizing the work and those of the con-

tract and bond for the faithful performance of same. *This is, of course, to be determined from the opinion.*" (Italics are mine).

I dissent from the italicized words, for this reason: That the facts of the case, as presented to this court, are only preserved in the record made by the circuit court and filed in the Court of Appeals. That is where the Court of Appeals must look for the facts of the case, and this court must likewise look there for them.

In *certiorari* proceedings the writ of this court commands the lower court to send up to this court the entire record of the lower court. That was done in this case, and is now before us, together with the opinion of the Court of Appeals written therein.

Under the laws and Constitution, the decisions of this court are the supreme laws of the State, and in order that there may be no conflict between the decisions of this court and those of the various courts of appeals, the Constitution provides that this court may order any of the various courts of appeals to send up the record in any case where there is a contention properly made, that there is a conflict between the rulings of that court and those of this court. The object of the constitutional provision being perfectly clear, namely: that there may be no conflict between the decisions of this court and those of those courts, or in other words, that the law as decided by those courts must be kept in harmony with those of this court, which declares the supreme law of the State, otherwise we should have two or more courts announcing conflicting rules as constituting the supreme law of the State, and thereby decide one case, upon a given state of facts, in favor of one person, and in another case, upon the same state of facts, in favor of another, in a different way.

Now the facts of the case are preserved in the record sent up to the Court of Appeals by the circuit court, and upon those facts the Court of Appeals predicates its opinion, and its opinion constitutes no part of the record sent up to it by appeal or upon writ of error to the

circuit court and the Court of Appeals must base its opinion upon the facts so sent up to it by the circuit court, and if it does so, and follows the decisions of this court, in declaring the law applicable to those facts, then its opinion is just as much a part of the supreme law of the State as are the decisions of this court, but if the Court of Appeals misstates the facts of the record as sent up to it by the circuit court, or omits to state any of the material facts thereof, and on that account, decides the case in harmony with the decisions of this court, but which would have contravened the ruling of this court had the facts been correctly or fully stated, then clearly that decision of the Court of Appeals would contravene the rulings of this court, that is, if in fact this court had passed upon a case which was the same as that presented to the Court of Appeals, by the record sent up to it by the circuit court. In other words, the Court of Appeals has no legal authority to garble the record of the circuit court, and thereby misstate the facts or omit certain material facts appearing in that record, and thereby make it appear that its opinion is either in harmony with the decisions of this court, or was not in conflict with any of our decisions. Such an opinion, however innocently rendered by the Court of Appeals, is both a palpable fraud upon the jurisdiction of this court, and upon the legal rights of the litigants to that suit, and amounts to judicial robbery, however innocent the Court of Appeals may be in its delivery. Such an opinion is nothing but polished brass, it may glitter and sound all right, but it is not pure gold, as the true basis of all judicial opinions should and ought to be, otherwise the basis of the opinion is a whited sepulcher, filled with dead men's bones, an outrage upon the law, equity and justice, and betrays the weakness and inefficiency of the courts in dealing with the affairs of men.

THE STATE ex rel. AMERICAN PACKING COMPANY v. GEORGE D. REYNOLDS et al., Judges of St. Louis Court of Appeals.

In Banc, April 30, 1921.

1. **CERTIORARI TO COURT OF APPEALS: Conflict of Opinions: Negligence: Pleading Generally: Res Ipsa Loquitur. Evidence of Specific Negligence.** The petition in a suit by a servant against his master, relator herein, for damages caused by the servant's hand being caught in a sausage-making and meat-chopping machine, after describing the machine and the manner of operating it and of starting and stopping it, alleged that "said machine by reason of the negligence of the defendants was suddenly and without warning or notice to the plaintiff started and caused to revolve, and the wheels and cylinder and crusher and knives thereof to revolve and turn, whereby the plaintiff's right hand and thumb and fingers thereof were caught in said machine." Relator's motion to make more definite and certain and its demurrer, having been successively overruled and no exceptions saved, it filed answer and went to trial. On the trial, it objected to any evidence because the petition did not state a cause of action, which objection was overruled. In the Court of Appeals this objection was renewed on the ground that the petition was intended to be based upon the doctrine of *res ipsa loquitur* and lacked averments essential thereto. The Court of Appeals decided that, inasmuch as on the trial, the case, by proof and instructions was submitted to the jury upon specific negligence within the allegations of the petition, the rule *res ipsa loquitur* was entirely removed from the case. *Held*, that this decision does not conflict with the prior rulings of the Supreme Court.
2. ———: ———: ———: ———: **Failure to State Cause of Action: Objection at Trial.** Where a motion of make the petition more definite and certain is overruled and no exception saved and a demurrer to the petition is overruled and thereafter an answer is filed and the case goes to trial, a general objection by defendant to any evidence on the ground that the petition does not state a cause of action, must be treated as if such motion and demurrer had never been filed; and in such case the petition will be regarded as sufficient after judgment, if, after allowing all reasonable implications and intendments in its favor, there is a sufficient statement to apprise defendant with reasonable certainty

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of the character of the action and the issues to be met. The Court of Appeals having so decided, its decision is not in conflict with previous rulings of the Supreme Court.

3. ———: ———: **Error of Court of Appeals in Applying Law to Facts.**

On *certiorari* to review a decision of a Court of Appeals alleged to be in conflict with a previous ruling of the Supreme Court it is not for the latter court to determine whether the former erred in its application of the rules of law to the facts in the record, but only whether in announcing the law of the case upon the facts as stated in its opinion the Court of Appeals failed to follow the last previous ruling of the Supreme Court.

4. ———: ———: **Two or More Courts of Appeals.** On *certiorari*

to review a decision by a court of appeals, the Supreme Court is not concerned with any conflict which may exist between opinions of any of the courts of appeals; but is only to determine whether the opinion in the case under review conflicts with a controlling decision of the Supreme Court.

Certiorari.

WRIT QUASHED.

Anderson, Gilbert & Hayden and M. N. Hayden
for relator.

(1) The St. Louis Court of Appeals affirmed the judgment of the trial court. Considering the errors assigned by relator in that court, the necessary effect of its decision is that it held the converse of all of the propositions outlined in the six points which follow, while it expressly decided against relator in respect to the first four points. (2) The petition in this case wholly failed to state facts sufficient to constitute a cause of action. The case involves the relationship of master and servant. In order for a recovery to be sustained upon the theory of *res ipsa loquitur*, it is essential that plaintiff's petition aver the following facts: (1) that the machine in question was under the sole control of relator; (2) that its plan of construction and method of operation, and especially the cause of its sudden starting, were facts peculiarly within the knowledge and control of relator; (3) that plaintiff possessed

neither the knowledge, nor the means of knowledge, of the cause of the sudden starting of the machine on the occasion of his injury; and (4) that there were no witnesses known to him by whom he could prove the cause of the sudden starting of the machine and no other means of proof of that fact within his knowledge. The petition must aver the foregoing facts or must contain other averments from which these facts may be reasonably inferred. *Klebe v. Distilling Co.*, 207 Mo. 480; *Removich v. Const. Co.*, 264 Mo. 43; *Ash v. Printing Co.*, 199 S. W. 994; *Byres v. Inv. Co.*, 219 S. W. 570.

(3) If a petition in a case seeking recovery of damages for personal injuries sustained by a servant, wholly fails to state facts sufficient to constitute a cause of action, it is defective upon a general demurrer, to the overruling of which exceptions need not be saved, nor is the point waived by the filing of an answer thereafter. The question of the sufficiency of the petition as against a general demurrer may be raised at any time and in the court of appellate jurisdiction for the first time. *R. S. 1909*, secs. 1800 and 1804; *Paddock v. Somes*, 102 Mo. 235; *Hoffman v. McCracken*, 168 Mo. 343; *Hudson v. Cahoon*, 193 Mo. 557; *White v. Railroad*, 202 Mo. 561; *Hanson v. Neal*, 315 Mo. 277; *Hubbard v. Slavens*, 218 Mo. 621; *Diener v. Publishing Co.*, 230 Mo. 619; *Chandler v. Railroad*, 251 Mo. 599; *Hynds v. Hynds*, 253 Mo. 20; *Warren v. Lead & Zinc Co.*, 255 Mo. 145; *Carpenter v. St. Joseph*, 263 Mo. 711. (4) If the petition in this case wholly fails to state facts sufficient to constitute a cause of action it is permissible and proper to object to the introduction of any testimony, and in this case we submit that relator's objection to the introduction of any testimony, for the reason assigned, should have been sustained. *Haseltine v. Smith*, 151 Mo. 404; *Ice Co. v. Kuhlmann*, 238 Mo. 685; *Thompson v. Lyons*, 220 S. W. 942. (5) If, as the St. Louis Court of Appeals holds, the plaintiff may bring his suit upon the theory *res ipsa loquitur* and upon the trial, over the objection of the defendant, offer evidence tending to establish

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the specific cause of the sudden starting of the machine, and may recover under such circumstances, then a plaintiff may bring his suit upon one theory and recover upon another and different theory. That is not the law as declared in numerous cases by this court. *Chitty v. Ry. Co.*, 148 Mo. 64; *Real Estate Co. v. Realty Co.*, 159 Mo. 567; *Von Trebra v. Gaslight Co.*, 209 Mo. 661. (6) The admission over the objection of relator, of testimony tending to prove specific negligence, was reversible error. *Gibler v. Ry. Co.*, 148 Mo. App. 475; *McAnany v. Shipley*, 189 Mo. App. 396; *Roscoe v. Ry. Co.*, 202 Mo. 576; *Price v. Ry. Co.*, 220 Mo. 345. (7) Instruction No. 1 given by the court to the jury at the instance of the injured plaintiff was erroneous in that it purported to cover the plaintiff's case and to submit his theory of liability, and in doing so submitted the specific negligence which the evidence, admitted over the objection of the defendant, tended to establish. It submitted issues nowhere pleaded nor referred to in the petition, and it was therefore reversible error to give it. *Degonia v. Railroad Co.*, 224 Mo. 564; *Scrivener v. Railroad Co.*, 260 Mo. 421; *Young v. Dunlap*, 195 Mo. App. 119; *McGinnes v. Railroad Co.*, 195 Mo. App. 390; *Gunn v. Ry. Co.*, 270 Mo. 517; *Traw v. Heydt*, 216 S. W. 1009; *Latham v. Harvey*, 218 S. W. 401; *State ex rel. Coal Co. v. Ellison*, 270 Mo. 645; *State ex rel. Long v. Ellison*, 272 Mo. 571.

Fred C. Steltmeier, Christian F. Schneider and Charles E. Morrow for respondents.

(1) The petition in this case contains an assignment of general negligence and is not subject to general demurrer. The defendant has not preserved its motion to make the same more definite and certain by bill of exceptions and saved no exceptions to the overruling of it and regardless of all other questions, the petition is good, for a general assignment of negligence is sufficient under the rule in Missouri. *Conrad v. De Montcourt*, 138 Mo. 311; *Frankel v. Hudson*, 271 Mo. 504; *Gurley v. Railroad*, 93 Mo. 445; *Mack v. Railroad*, 77 Mo. 232; *Lemay v. Railroad*, 105 Mo.

370; Sullivan v. Railroad, 97 Mo. 113. Following these Missouri decisions, the Courts of Appeal have often so decided. Dieter v. Zbaren, 81 Mo. App. 614; Jacquin v. Railroad, 57 Mo. App. 320; Hill v. Railroad, 49 Mo. App. 520; Wills v. Railroad, 44 Mo. App. 51; Quinley v. Traction Co., 180 Mo. App. 299; Wyler v. Ratican, 150 Mo. App. 478. (2) Under a plea of general negligence the proof of any negligence which causes the injury is permissible and the particular acts relied upon may be shown. Frankel v. Hudson, 271 Mo. 504; Price v. Street Ry. Co., 220 Mo. 435; Dickson v. Railroad, 104 Mo. 491; Fleming v. Railroad, 263 Mo. 188. Following these decisions of this court, the Courts of Appeal have often so held. Wolven v. Traction Co., 143 Mo. App. 645; Lauff v. Carpet Co., 186 Mo. App. 135; Feldewerth v. Railroad, 181 Mo. App. 640; Lafever v. Pryor, 218 S. W. 970; Fisher v. Golladay, 38 Mo. App. 538; James v. Mott, 215 S. W. 913. (3) The doctrine if *res ipsa loquitur* applies to the facts of this case and for that reason a plea of general negligence is proper. Blanton v. Dold, 109 Mo. 64; Ash v. Printing Co., 199 S. W. 994; Price v. Street Ry. Co., 220 Mo. 435; Myers v. Independence, 189 S. W. 816. (4) By answering, defendant waived its motion to make the petition more definite and certain and waived all objections except that the court has no jurisdiction of the subject-matter of the action and that the petition does not state facts sufficient to constitute a cause of action. R. S. 1909, sec. 1804; Ashton v. Pennfield, 233 Mo. 417; Ware v. Johnson, 55 Mo. 500; Spillane v. Railroad, 111 Mo. 555; Titus v. Development Co., 264 Mo. 240. (5) On *certiorari* the only questions which may be presented to this court are whether or not the opinion of the Court of Appeals is contrary to the last rulings of this court upon a question of law. State ex rel. Const. Co. v. Reynolds, 214 S. W. 369; State ex rel. Peters v. Reynolds, 214 S. W. 121.

ELDER, J.—*Certiorari* to quash judgment of the St. Louis Court of Appeals.

Relator seeks by writ of *certiorari* to quash a judgment entered by the St. Louis Court of Appeals affirming a judg-

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ment of the Circuit Court of the City of St. Louis, in a case in which one Jacob Heckfuss was respondent, and the American Packing Company (relator herein, was appellant, reported in 224 S. W. 99, for the alleged reason that said Court of Appeals failed to follow the last previous ruling of this court, as required by the Constitution of this state.

The opinion of the Court of Appeals outlines the petition in the case, and the negligence charged therein, as follows:

"The petition alleges that plaintiff was a laborer in the employ of defendant at its plant and factory in the City of St. Louis; that defendant in operating its business at said plant used a machine consisting of a hopper, cylinder, crusher and knives in making sausage and chopping meat; that this machine was operated by power, transmitted to it by belts and pulleys; that he was ordered and directed by defendant to clean said machine or grinder, and at the time said machine was stopped and not in motion. The negligence of defendant is charged in the following language: ' . . . The said machine by reason of the negligence of the defendants was suddenly and without warning or notice to the plaintiff started and caused to revolve, and the wheels and cylinder and crusher and knives thereof to revolve and turn, whereby the plaintiff's right hand and thumb and fingers thereof were caught in said machine, . . . ' "

The evidentiary facts of the case are thus set out in the opinion:

"Plaintiff was injured while cleaning one of these machines at defendant's establishment. It appears from the testimony that he had worked in a similar plant a number of years under the same foreman and bosses he was working under at the time he was injured. He had gone to work at the plant where he was injured only a few days before the accident took place. The parties for which he had worked before this had taken over the property of the West End Packing and Provision Company, and the new company was known as the Amer-

ican Packing Company. Plaintiff had been working at this machine where he was injured only an hour or two before the accident happened. The machine consists of a funnel-shaped hopper, projecting up through the bottom of which are the knives, which cut the meat as they are revolved when attached to a shaft on which are fastened two pulleys. One is a loose pulley, the other a tight pulley. When it is desired to stop the machine the belt, by a very simple appliance, is shifted from the tight pulley to the loose pulley. The machine is then stopped, but as soon as the belt is shifted back to the tight pulley it starts the machine. After plaintiff had cleaned the machine and had started to replace the knives, the machinery started with a sudden jerk and stopped just as suddenly, but not until after plaintiff had received his injuries, which it is unnecessary to describe here; as there is no point made that the verdict is excessive. . . .

“The proof adduced shows that the loose pulley on the shaft, located directly by the side of the tight pulley, was too loose, causing the belt to shift over to and catch on to the tight pulley, suddenly starting the machine. This was shown by the testimony of several witnesses, including defendant’s foreman, who investigated this particular machine, belt and pulleys, and observed the operation of the same immediately after the accident.”

Prior to answering the relator filed a motion to make the petition more definite and certain, which was overruled. It then filed a demurrer, the ground of which was that the petition did not state facts sufficient to constitute a cause of action. This demurrer was likewise overruled. Relator, without having saved exceptions to either of such rulings, then filed an answer, the same being a general denial, with a plea of contributory negligence. At the beginning of the trial, relator objected to the introduction of any evidence for the reason that the petition did not state facts sufficient to constitute a cause of action.

Relator, in its petition for our writ, and in its brief, suggests various matters wherein the opinion of the Court of Appeals conflicts with controlling decisions of this court. These, with the particulars pertinent thereto, we shall treat of in the course of the opinion.

I. Relator contends that the petition did not state facts sufficient to constitute a cause of action in that the allegation of negligence contained in the petition "was intended as one bringing the case within the doctrine *res ipsa loquitur*," upon which theory it was essential that the petition should have averred the following facts, or averments from which those facts might be reasonably inferred, to-wit:

"(1) That the machine in question was under the sole control of relator; (2) that its plan of construction and method of operation, and especially the cause of its sudden starting, were facts peculiarly within the knowledge and control of relator; (3) that plaintiff possessed neither the knowledge, nor the means of knowledge, of the cause of the sudden starting of the machine on the occasion of his injury; and (4) that there were no witnesses known to him by whom he could prove the cause of the sudden starting of the machine and no other means of proof of that fact within his knowledge;" and, no such averments appearing in the petition, that the ruling of the Court of Appeals is in conflict with the following controlling decisions of this court, viz: *Klebe v. Distilling Co.*, 207 Mo. 480; *Removich v. Construction Co.*, 264 Mo. 43; *Ash v. Printing Co.*, 199 S. W. 994; *Von Trebra v. Gaslight Co.*, 209 Mo. 648; *Chouquette v. Railroad*, 152 Mo. 257; *Fisher & Co. v. Realty Co.*, 159 Mo. 562, and *Byers v. Investment Co.*, 219 S. W. 570.

The opinion of the Court of Appeals bearing upon the foregoing contention is as follows:

"One of the principal points relied upon by appellant for reversal is that the petition attempted to aver facts bringing the case within the rule *res ipsa loquitur*, but plaintiff proved facts to which that rule cannot be

applied to sustain a recovery, and that the petition did not state such facts as to bring the case within the rule. In our view of this case it is unnecessary to decide whether or not, under the allegations in this petition, the rule *res ipsa loquitur* would apply. Whatever may have been the situation at the time of filing this petition, when this case was submitted to the jury the rule *res ipsa loquitur* was entirely removed from the case by the proof and by the instructions."

The case of *Klebe v. Distilling Co.*, supra, was a suit wherein the plaintiff was injured, while removing whiskey barrels from an elevator, as the result of the breaking of a wire rope which sustained the elevator, thereby causing the same to fall. This division held, that under the evidence adduced, the rule of *res ipsa loquitur* did not apply. However, no question of pleading was there involved, and the case does not touch the matter in hand.

Removich v. Construction Co., supra, was a case in which plaintiff, who was engaged in digging a trench, was injured when a steel cable attached to a bucket used to hoist the earth broke, allowing the bucket to fall upon him. The circuit court sustained a motion to require plaintiff to make his petition more definite and certain. The plaintiff refused to do so, whereupon defendant filed a demurrer to the petition, which was sustained. From this order an appeal was taken. Division Two of this court held that as the petition stated nothing more than the fact that the steel cable broke and the bucket fell and plaintiff was hit and hurt, under the doctrine of *res ipsa loquitur* it did not state a cause of action of negligence on the part of the master. The allegations of fact in the charge of negligence in that case are in no way similar to the facts alleged in the case under review. Furthermore, in that case, after a motion to make the petition more definite and certain and a demurrer thereto had been sustained, the plaintiff refused to plead further and appealed. Here, after a motion to make more definite and certain and a demurrer had been overruled, without saving its exceptions

relator answered and went to trial. Accordingly, the Removich case cannot be said to constitute authority upon which to hold that a petition fails to state a cause of action, after a trial has been had and verdict rendered thereon.

In the case of *Ash v. Printing Co.*, supra, the facts which relator contends should properly be pleaded were substantially set out in the petition and this division held that the same stated a good cause of action under the doctrine of *res ipsa loquitur*. However, that case did not hold that it was essential to plead the facts cited by relator. In passing upon the sufficiency of the petition the court was guided by the case of *Blanton v. Dold*, 109 Mo. 64, wherein it was held that the sudden starting of a machine, contrary to its usual manner of operation, afforded prima-facie evidence of some want of care in its original construction or then condition. This was but declaratory of the doctrine of *res ipsa loquitur*, a question which was not decided by the Court of Appeals in the case at bar.

It is apparent that neither of the foregoing cases contains any rulings opposed to the views of the Court of Appeals as set forth in the opinion herein. And neither does *Chouquette v. Railroad Co.*, *Von Trebra v. Gaslight Co.*, *Fisher & Co. v. Realty Co.*, or *Byers v. Investment Co.*, supra, in the remotest way support the theory that the opinion of the Court of Appeals conflicts with any ruling in those cases. The point made is somewhat devious and we rule it against relator.

II. Relator next contends that "if the petition in this case dose not state facts sufficient to constitute a cause of action, that point was not waived by relator, either by failing to save exceptions to the ruling of the trial court overruling the demurrer, or by thereafter filing an answer," and that the opinion of the Court

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of Appeals in that respect is in conflict with the following controlling decisions of this court, viz: *Paddock v. Somes*, 102 Mo. 226, 1. c. 235; *Hudson v. Cahoon*, 193 Mo. 547, 1. c. 557; *White v. Railroad*, 202 Mo. 539, 1.

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c. 561; *Hanson v. Neal*, 215 Mo. 256, l. c. 277; *Hubbard v. Slavens*, 218 Mo. 598; *Diener v. Publishing Co.*, 230 Mo. 613, l. c. 619; *Chandler v. Railroad*, 251 Mo. 592, l. c. 599; *Hynds v. Hynds*, 253 Mo. 20, 161 S. W. 812; *Warren v. Lead & Zinc Co.*, 255 Mo. 138, l. c. 145, 164 S. W. 206; *Carpenter v. St. Joseph*, 263 Mo. 705, l. c. 711; 174 S. W. 53; *Cole v. Parker-Washington Co.*, 276 Mo. 220, l. c. 266.

That portion of the opinion of the Court of Appeals, which is pertinent to this insistence is as follows:

“Defendant saved no exceptions to the action of the trial court in overruling its motion to make more definite and certain, nor to its demurrer to the petition. Therefore we must treat the petition, when its sufficiency is challenged, as if no demurrer had been filed, and it will be regarded sufficient after judgment, if, after allowing all reasonable implications and intendments in its favor, there appears to be a sufficient statement to apprise the defendant with reasonable certainty of the character of the action and the issues it must meet.

“It has been repeatedly held in this State that a petition which sets out the acts about which a plaintiff is complaining with reasonable certainty and clearness, followed by a general averment that the acts complained of were negligently done, is sufficient. [*Dieter v. Zbaren*, 81 Mo. App. 612; *Wylar v. Ratican*, 150 Mo. App. 474, 131 S. W. 155; *Quinley v. Traction Co.*, 180 Mo. App. 287, 165 S. W. 346.]

“The charge of negligence in the petition is the sudden starting of the machinery without warning or notice. This negligence is charged generally, and this we think is sufficient after verdict. [*White v. Railroad*, 202 Mo. 539, 101 S. W. 14; *Lafever v. Pryor*, 218 S. W. 970.]”

Upon an examination of the above-mentioned decisions of this court we are unable to find wherein the ruling of the Court of Appeals comes in conflict therewith. While some thereof are entirely beside the question, the remainder only go to hold that if a defendant pleads to the merits, he waives everything in the petition

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but two points: First—That the petition does not state facts sufficient to constitute a cause of action; Second—That the court has no jurisdiction over the subject-matter of the action. This is axiomatic. Relator, however, proceeds upon the theory that the petition here wholly fails to state facts sufficient to constitute a cause of action, which the Court of Appeals in its opinion found to the contrary. We are not to determine whether the view of the Court of Appeals is correct or incorrect, but only whether it conflicts with a controlling decision of this court. [State ex rel. Pelligreen Const. Co. v. Reynolds, 214 S. W. 369; State ex rel. Wahl v. Reynolds, 272 Mo. l. c. 596.] We rule the point against relator.

III. Relator insists that its objection to the introduction of any testimony should have been sustained, and that the opinion of the Court of Appeals bearing on that question is in conflict with *Haseltine v. Smith*, 151 Mo. 404; *Ice Co. v. Kuhlmann*, 238 Mo. 685, and *Thompson v. Lyons*, 281 Mo. 430, 220 S. W. 942.

The opinion pertinent to this contention is as follows:

“Appellant objected to the introduction of any testimony for the reason that the petition did not state facts sufficient to constitute a cause of action, but we think the petition was good against an objection of this kind. [Thompson et al. v. Lyons, 281 Mo. 430, 220 S. W. 942.]”

Hazeltine v. Smith is not reported in 151 Missouri Report.

Ice Co. v. Kuhlmann, supra, if anything, is in harmony with the ruling of the Court of Appeals. It holds that: “An objection to the petition made after the trial has begun is tolerated, but not encouraged, because it smacks of ambush and of lying in wait, and therefore every reasonable intendment and fair implication will then be resolved in favor of the petition, and if it states a cause of action, though defectively, the objection will be overruled.”

Thompson v. Lyons, supra, supports the ruling of the Court of Appeals. There, in an action for deceit in misrepresenting the purchase price of land purchased by plaintiffs and defendants jointly, the petition was held

sufficient as against objection to the introduction of any evidence. The point made is wholly without merit.

IV. Relator urges that when the Court of Appeals held "that the testimony admitted removed the case

from the theory *res ipsa loquitur*," its decisions contravened the controlling decision of Fisher & Co. v. Realty Co., 159

Mo. 562, l. c. 567; Von Trebra v. Gaslight Co., 209 Mo. 648, l. c. 661, and Chitty v. Railway Co., 148 Mo. 64.

Mo. 562, l. c. 567; Von Trebra v. Gaslight Co., 209 Mo. 648, l. c. 661, and Chitty v. Railway Co., 148 Mo. 64.

The opinion of the Court of Appeals upon this question is as follows:

"Plaintiff undertook to prove, and there was sufficient testimony to submit the question to the jury, as to whether or not the sudden starting of this machine was caused by the failure of the defendant to exercise ordinary care to remedy the same and discover the defects so as to have avoided the injury. When plaintiff assumed this burden to prove the exact and specific acts of negligence causing the injury, and the Court submitted the case to the jury upon the specific acts of negligence and instructed the jury that the burden was on plaintiff to prove all these facts by a preponderance of the evidence, then this case was taken entirely outside the rule *res ipsa loquitur* and such rule was no longer applicable in this case. Therefore, it is unnecessary to decide and also immaterial, as to whether or not the rule could have been invoked on the pleadings and upon plaintiff's merely proving the occurrence of the accident at the time and place, and under the circumstances alleged in the petition, without any proof as to specific acts of negligence."

The cases cited by relator merely hold that a plaintiff cannot plead one cause of action and recover upon another not pleaded. They also hold, however, as do a long line of decisions, that the variance is waived if not objected to in the manner required by statute. This requirement was not met by relator. Furthermore, as argued by counsel for respondents, it is not for this court to determine whether the St. Louis Court of Ap-

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peals erred in its application of the rules of law to the facts in the record, "but only whether in announcing the law of the case upon the facts as stated in its opinion it failed to follow the last previous ruling of this court." [State ex rel. Peters v. Reynolds, 214 S. W. 1. c. 122.] We rule the point against relator.

V. Relator further urges that the admission, over the objection of relator, of testimony tending to prove specific negligence, was reversible error. Price v. Railway Co., 220 Mo. 435, and Roscoe v. Railway Co., 202 Mo. 576, cited by relator, are authority to sustain respondents. We are further cited to a decision of the St. Louis Court of Appeals and of the Kansas City Court of Appeals. On *certiorari* we are not concerned with any conflict which may exist between opinions of any of the Courts of Appeal. We are only to determine whether the opinion in the case under review conflicts with a controlling decision of this court. The point made cannot be sustained.

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VI. Relator finally contends that Instruction No. I, given by the court to the jury at the instance of plaintiff Heckfuss, was erroneous "in that it purported to cover the plaintiff's case and to submit his theory of liability, and in doing so submitted the specific negligence which the evidence, admitted over the objection of defendant, tended to establish; and that it submitted issues nowhere pleaded nor referred to in the petition." As being in contravention to the opinion of the Court of Appeals, relator cites several decisions of Courts of Appeal (with which we are not concerned) and the cases of Degonia v. Railroad Co., 224 Mo. 564; Scrivner v. Railroad Co., 260 Mo. 421; Gunn v. United Railways, 270 Mo. 517; State ex rel. Coal Co. v. Ellison, 270 Mo. 645, and State ex rel. Long v. Ellison, et al., 272 Mo. 571.

Instruction No. 1 is as follows:

"The court instructs the jury if you believe from the evidence that the defendant, American Packing Com-

pany, was engaged in preparing and packing meats and provisions, and manufacturing sausage and other like products, at its plant and factory in the City of St. Louis, Missouri, and that plaintiff was in the employ of said defendant as a laborer, at its said plant and factory.

“And if the jury further believe from the evidence that said defendant used and operated in its said business at its said plant, a certain machine or grinder consisting of a hopper and a cylinder and crusher and knives, and that said machine or grinder was operated and propelled by power transmitted to it by means of belt, wheels and pulleys, and that said machine was started and put in motion by shifting the belt thereof which transmitted the power to said machine from a loose wheel or pulley onto a tight wheel or pulley, fastened to the shaft of said machine.

“And if the jury further believe from the evidence that said loose wheel or pulley to which the belt of said machine was shifted, and on which the belt thereof run when said machine was stopped, and not in motion, was so placed upon the shaft of said loose wheel or pulley that the said wheel or pulley wobbled while said belt was running thereon, and by reason thereof was liable to cause said belt to shift over to and upon said tight wheel or pulley, so attached and fastened to the shaft of said machine, and thereby cause the said machine and the knives and crusher thereof to revolve and be put in motion and that by reason thereof said machine was defective unsafe and dangerous, and that said defendant knew, or by the exercise of ordinary care could have known of said defective, unsafe and dangerous condition of said loose wheel or pulley, as aforesaid, in time by the exercise of ordinary care to have remedied the same before the plaintiff was injured, if you believe he was injured.

“And if the jury further believe from the evidence that on or about the 20th day of May, 1916, that said machine had been stopped by the defendant and was not in motion, and the plaintiff was ordered and directed by said defendant to clean said machine or grinder, and that in order to so clean said machine it was necessary

for plaintiff to take the crusher and knives out of the same and to clean the cylinder thereof, and to replace the said crusher and knives in said machine; and that in obedience to said order and direction of said defendant, if you so find that plaintiff, while in the service of the defendant, and while working in the line of his duty, and within the scope of his employment as a servant of said defendant, took the crusher and knives out of said machine while said machine was stopped and not in motion and cleaned said machine and crusher and the knives thereof and replaced said knives and crusher in said machine; and that by reason of said defective and unsafe and dangerous condition of said loose wheel or pulley aforesaid, and by reason of the defendant's failure to so exercise ordinary care, as aforesaid, if you so find, the belt of said machine shifted from said loose wheel or pulley onto said tight wheel or pulley, so fastened to the shaft of said machine, and said machine was caused to start, revolve and be put in motion, and by reason thereof plaintiff's right hand and the fingers and thumb thereof, while in said machine, and while he was in the act of replacing the said knives and crusher therein, were caught and crushed, and that plaintiff was thereby injured, and that plaintiff was guilty of no negligence which directly contributed to cause his said injury, as defined in other instructions, your verdict must be for the plaintiff."

On motion for rehearing the Court of Appeals had the following to say with reference to this insistence:

"The negligence set out in the petition is alleged in a general way, but the allegations of negligence are broad enough to permit the introduction of testimony showing such negligence specifically.

"As was said by the Kansas City Court of Appeals, in *Lafever v. Pryor*, 218 S. W. 970:

"The petition charged general negligence, and the court submitted to the jury the particular negligence which the evidence tended to prove. This was not submitting issues not included within the allegations of the

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petition, since, under a general charge in the pleading, the particular acts relied upon may be shown and instructions may be based thereon (authorities cited).'

"The specific acts of negligence submitted to the jury in plaintiff's instruction were such acts as may be shown under the general allegations in this petition, and when such specific acts of negligence are shown, then the instructions must require the jury to find the particular acts of negligence said to be revealed by the testimony. [Lauff v. Carpet Company, 186 Mo. App. 123, l. c. 135, 171 S. W. 986.] "

Degonia v. Railroad Co., supra, and State ex rel. Coal Co. v. Ellison, supra, both go to the point that an instruction cannot be broader than the pleadings, although the evidence might have taken a broader range. Here, again, however, relator would have us determine whether the conclusion of the Court of Appeals is correct or incorrect, which we have said is not our province.

Scrivner v. Railroad Co., supra, and Gunn v. United Railways, supra, are beside the question.

State ex rel. Long v. Ellison, supra, holds that an instruction purporting to cover the whole case, from which is omitted an element of negligence necessary to plaintiff's right to recover, cannot be cured by one given for defendant.

None of these cases are in conflict with the opinion of the Court of Appeals and the point is ruled against relator.

This concludes the several questions raised by relator. From all of the foregoing it follows that our writ was improvidently granted and should be quashed. It is so ordered.

All concur, except *Woodson, J.*, absent.

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ABORTION.

1. **Gravamen: Intent.** The production of an abortion is not the offense denounced by the statute (Sec. 4458, R. S. 1909), but the intent to produce a miscarriage or abortion, where the act is not a medical necessity. The intent constitutes the gravamen of the offense, and the evidence must establish such unlawful intent. *State v. Keller*, 124.
2. **Intent: Sufficient Evidence: Dying Declaration.** A conviction under the statute declaring that "any person who, with intent to produce or promote a miscarriage or abortion" administers "to a woman (whether actually pregnant or not), any instrument or other method or device to produce miscarriage or abortion," cannot be based upon the dying declaration of the deceased woman alone unless the State also show that she was pregnant when the operation was performed. If there is no evidence to show that the woman was pregnant at the time of the operation, her dying declaration, uncorroborated, is not sufficient (under Sec. 5240, R. S. 1909) to sustain a conviction. *Ib.*

ABSTRACT.

Additional Abstract. Where appellant filed her abstract thirty days before the case was for hearing on the docket, an additional abstract filed by respondent two days before said docket date is barred from consideration by Rule 11. Nor can it be considered if no part of the record as a bill of exceptions. *Wagoner v. Wagoner*, 567.

ACCOUNTING.

1. **Evidence: Statement Called For by Memorandum.** Where a so-called declaration of trust recites that the maker has this day rendered the beneficiary and her daughter "a statement setting forth in full all assets of the estate, including the amount which appears in the probate court," such statement, submitted with the declaration of trust, is of equal value as evidence. *Price v. Boyle*, 257.
2. ———: ———: **Common Experience.** Where the executor of his father's will, which gave to the widow a life estate in all the property, had made four annual settlements which showed he had paid the widow an average of \$1391.10 annually, and at the time of the final settlement, made eighteen months after the fourth settlement, he gave to her a written memorandum which recited he had received from her a receipt for \$4,241.10, to be filed with the final settlement, "yet as a matter of fact I have not paid this amount of money to her, and have obtained her receipt simply for the purpose of closing up the administration in the probate court," and further recited that he had "this day rendered" to her and her daughter "a statement setting forth in full all

ACCOUNTING—Continued.

the assets of the estate, including the above amount which appears in the probate court," reason and common sense must be allowed their common functions, if resort must be had to evidence outside the probate court to impeach the final settlement, and it is contrary to reason that the executor should have paid his mother nothing to live on during said eighteen months, and the "statement" mentioned in the declaration showing that during about six months of the eighteen he had paid her \$762, the presumption must be indulged that he paid her a corresponding amount during the other twelve months, and there being no other evidence that he appropriated the \$4,241.10 mentioned in the memorandum, his executrix cannot, after his and his mother's death, and nearly forty years after the final settlement, be charged, in a suit for an accounting brought on the theory that he was a trustee of an express trust, with the whole of said \$4,241.10. *Price v. Boyle*, 257.

3. **Evidence: Sale of Trust Property: Consideration Recited in Deed.** A consideration recited in the trustee's deed conveying property to a purchaser is prima-facie evidence of the real consideration, and holds until the contrary is shown. But where the property in 1875 rented for about \$1000 a year, which indicated a value of about \$17,000, evidence that by 1890 the neighborhood had become bad, that the rents had decreased to \$250 a year, and that it was in 1897 traded for other real estate, is some evidence that the recited consideration of \$17,000 was not the real consideration, for it is a well known fact that, in trading real estate, the consideration mentioned in the deed is often not the cash value. *Ib.*
4. **Trustee: Accounting to Cestui Que Trust.** A trustee in charge of trust property must account to his *cestui que trust*, and he is accountable on the termination of the trust at her death; and in a suit for an accounting brought against his executrix, it is significant that there is no showing that he did not account at the death of the *cestui que trust*, although he survived her four years; without such a showing, it is a matter of grave doubt whether plaintiff makes out a prima-facie case. *Ib.*
5. **Laches: Unreasonable Delay.** Where a party rests upon his rights, and fails to bring a suit when he might have done so, for a period short of the period of limitations, in a proceeding in equity, relief may be denied on the ground of unreasonable delay, where circumstances intervene to work hardship upon defendant in making his defense. Where, by reason of delay, evidence becomes unavailable, or important witnesses have died and it becomes impossible to ascertain the facts, laches will bar recovery. *Ib.*
6. **———: Accounting by Trustee.** Where the administration of the estate closed in 1877, and the trustee, who was executor, if he appropriated any of the life estate, began to do so during that administration, and the *cestui que trust*, then sixty years of age, made no complaint; there was no complaint during the subsequent thirty years, but letters were introduced breathing the greatest confidence in him on the part of the *cestui que trust* and her daughter; there was no intimation that the mother during said thirty years was not entirely satisfied with his management of the estate; after her death in 1907, and his in 1911, all that remained to show the state of the account were the public records and such statements as he had rendered his mother during her lifetime; such statements in detail rendered during several years

ACCOUNTING—Continued.

of his trust were produced in evidence, which indicates that other statements covering the rest of the time were rendered; her daughter had possession of all papers her mother possessed relating to the estate, and she testified that she destroyed most of those papers; no account book was presented; the suit for an accounting was brought by the administrator of the *cestui que trust* four years and 364 days after her death, and at the instigation of her daughter, who was disappointed in the provisions of the trustee's will, and was brought more than a year after his death; by the suit it is attempted to charge him with the consideration mentioned in a deed for real estate exchanged for other property, and the trustee alone could explain whether such named sum was the real consideration, and the only evidence that he had not accounted in full for the trust estate is the fragmentary papers which his sister had neglected to destroy when she destroyed the other statements rendered, it will be held that the suit is barred by laches. *Ib.*

ACTIONS.

1. **Freight Rates: Overcharges: As Between Agent and Consignee.** Where the purchaser bore the burden of transportation and paid all the freight charges on railroad ties bought by his agent on commission, as between them he, and not such agent, is entitled to all overcharges made by the railroad. *Cobb v. Joyce-Watkins Co.*, 39.
2. ———: ———: **As Between Vendor and Purchaser.** Where the price of the railroad ties to the vendors was the price at the stations if destination less the freight charges from the loading station to said destination, and the vendors were paid that price, the freight charges being paid by the consignee, such vendors are not entitled to recover the excess in the overcharge of freight rates made by the railroad. *Ib.*
3. **Libel: Survival.** Under the statutes, if the libeler dies before suit is brought, no action for libel can be maintained against his devisees or executor or administrator. *Hyde v. Nelson*, 130.
4. **Limitations: Effect of Imprisonment and Bail.** Under the statute (Sec. 1323, R. S. 1919) declaring that "if any person entitled to bring an action in this article specified, at the time the cause of action accrued be imprisoned on a criminal charge, or in execution under a sentence of a criminal court for less than his natural life, such person shall be at liberty to bring such action within the respective times in this article limited after such disability is removed," an action for libel brought by a person who is neither imprisoned nor physically restrained during the pendency of a prosecution against him for murder is barred by limitations if not brought within two years after the libel was published. *Ib.*
5. **Laches: Unreasonable Delay.** Where a party rests upon his rights, and fails to bring a suit when he might have done so, for a period short of the period of limitations, in a proceeding in equity, relief may be denied on the ground of unreasonable delay, where circumstances intervene to work hardship upon defendant in making his defense. Where, by reason of delay, evidence becomes unavailable, or important witnesses have died and it becomes impossible to ascertain the facts, laches will bar recovery. *Price v. Boyle*, 257.

ACTIONS—Continued.

6. **Contributory Negligence.** Even where the defendant is guilty of acts of negligence which furnish the opportunity of plaintiff's injury, still if plaintiff is guilty of reckless acts which are the immediate cause of his injury he cannot recover damages for it. *Bonanomi v. Purcell*, 436.
7. **Negotiable Securities: Theft of Interim Certificates: Bona-Fide Purchasers.** Certain negotiable *interim* certificates of the United States were stolen from a bank in Missouri, and were shortly afterward acquired by a bank in Oklahoma, in the ordinary course of business from two of its customers who resided and did business in its home town, without notice of or reason to suspect any defect in their title, and for their full face value. The Oklahoma bank was at the same time buying from other persons on the same terms. *Held*, that it was a bona-fide purchaser for value, and had the title as against the Missouri bank. *Natl. Bank v. People's Bank*, 464.

ADMINISTRATION.

1. **Accounting to Cestui Que Trust.** A trustee in charge of trust property must account to his *cestui que trust*, and he is accountable on the termination of the trust at her death; and in a suit for an accounting brought against his executrix, it is significant that there is no showing that he did not account at the death of the *cestui que trust*, although he survived her four years; without such a showing, it is a matter of grave doubt whether plaintiff makes out a prima-facie case. *Price v. Boyle*, 257.
2. ———: **Accounting by Trustee.** Where the administration of the estate closed in 1877, and the trustee, who was executor, if he appropriated any of the life estate, began to do so during that administration, and the *cestui que trust*, then sixty years of age, made no complaint; there was no complaint during the subsequent thirty years, but letters were introduced breathing the greatest confidence in him on the part of the *cestui que trust* and her daughter; there was no intimation that the mother during said thirty years was not entirely satisfied with his management of the estate; after her death in 1907, and his in 1911, all that remained to show the state of the account were the public records and such statements as he had rendered his mother during her lifetime; such statements in detail rendered during several years of his trust were produced in evidence, which indicates that other statements covering the rest of the time were rendered; her daughter had possession of all papers her mother possessed relating to the estate, and she testified that she destroyed most of those papers; no account book was presented; the suit for an accounting was brought by the administrator of the *cestui que trust* four years and 364 days after her death, and at the instigation of her daughter, who was disappointed in the provisions of the trustee's will, and was brought more than a year after his death; by the suit it is attempted to charge him with the consideration mentioned in a deed for real estate exchanged for other property, and the trustee alone could explain whether such named sum was the real consideration, and the only evidence that he had not accounted in full for the trust estate is the fragmentary papers which his sister had neglected to destroy when she destroyed the other statements rendered, it will be held that the suit is barred by laches. *Ib.*

ADVERSE USER. See **Highways.**

APPEALS.

1. **Constitutional Question: Preserved for Review.** If the constitutional question was raised only by a motion to quash the information, and the bill of exceptions fails to show that a motion to quash was filed or overruled, the question is not for consideration on appeal. *State v. Howe*, 1.
2. **Appellate Practice: Verdict for Right Party: Decision on Point Not Raised by Instructions.** Plaintiff sued for curtesy consummate in his wife's lands conveyed by her alone in her lifetime. The answer was a general denial, and verdict was for defendants. The court granted a new trial on the ground that the verdict was "unsupported by any evidence," and the defendants appeal. Both plaintiff and defendants tried the case on the theory that if plaintiff and the sole grantor in the deed were husband and wife, that issue was born alive of the marriage, that she was seized of the premises during coverture and died before suit was brought, and that defendants were then in possession, plaintiff was entitled to recover. Plaintiff's instructions were framed on this theory, and defendants filed no demurrer and the only instructions asked by them were given, and these related only to the burden resting upon plaintiff to prove the birth of living issue and the other issues of fact set out in plaintiff's petition. *Held*, that, notwithstanding court and counsel were mistaken as to the law of the case, in that their theory was that the husband, not having joined in his wife's deed, had a curtesy estate in the land, yet, the verdict being for the right party in view of the facts and the law, the order granting a new trial will be reversed, and the cause remanded with directions to set it aside and to reinstate the judgment. *Brook v. Barker*, 13.
3. **Evidence: General Objection: Exception.** An exception exists to the rule that a general objection that certain evidence is irrelevant, incompetent and immaterial, is too broad and sometimes constitutes no objection at all. It is that if the evidence objected to is not competent for any purpose a specific objection has no office and a general objection is sufficient. *Ex parte Brew. Co. v. Ellison*, 139.
4. **Objections: Made by One of Several Defendants.** When one of several defendants makes an objection to the admission of testimony it is unnecessary for the others to repeat it in order to put themselves in position to base an assignment of error upon it on appeal. *Ib.*
5. ———: ———: **Motion for New Trial.** Likewise, one of a group of defendants may, in his motion for a new trial, adopt an objection made by another defendant to a ruling of the trial court in admitting evidence and base an assignment of error thereon. *Ib.*
6. **Demurrer: General Grounds: Failure to Brief: Abandonment.** The general grounds of a demurrer in an original proceeding in the Supreme Court will be considered as abandoned if neither briefed nor urged. If the brief does not urge the general ground that the city did not have power to issue bonds for the purposes for which they were issued, but the objections are confined to irregularities in the issuance of them, the question of the power of the city to issue them will be considered as abandoned. *State ex rel. City of Jefferson v. Hackmann*, 156.

APPEALS—Continued.

7. **Errors Against Respondent.** Only adverse rulings of the trial court can form the basis of a complaint by an appellant. Upon an appeal by plaintiff alone from a judgment in her favor, assignments by defendant of errors based upon alleged improper admission and exclusion of testimony and the giving and refusing of instructions are not matters for consideration. *Cochran v. Wilson*, 210.
8. **Appellate Jurisdiction: Amount in Dispute: Demand.** In a suit in equity to restrain defendants from transgressing upon plaintiff's property rights, in which it is alleged that defendants have "damaged the plaintiff in a sum in excess of \$10,000" and praying that the court "award the plaintiff such damages as it has sustained in the sum of \$7,500," the plaintiff's appeal, upon a finding in the trial court for defendants, is to the Court of Appeals. Plaintiff, under the prayer, could in no case recover in excess of \$7,500, and that is the amount in dispute upon its appeal. *Germo Mfg. Co. v. Combs*, 273.
9. ———: **Allowance for Improvements.** Where the trial court held that the guardian's deed conveying the land should be set aside, and the plaintiff did not file a motion for a new trial nor appeal, he cannot be heard to complain in the appellate court of the amount allowed to defendant for improvements. *Bopst v. Williams*, 317.
10. ———: **Trial de Novo in Supreme Court.** Where a case was treated in the trial court as an equity case with the acquiescence and consent of the plaintiff, he cannot object to its being so treated on appeal, and therefore this court will not be limited to consideration of questions of law, but may try the case *de novo* on the facts. *Stripe v. Meffert*, 366.
11. ———: ———: An appeal cannot be taken from an order overruling plaintiff's motion for a new trial and to set aside an involuntary nonsuit taken by him as to a certain defendant. Such an order is not a final judgment. *Bonanomi v. Purcell*, 436.
12. **From Justice: Waiver of Defects in Process.** Under Revised Statutes 1909, Sections 7568 and 7579, the taking of an appeal from a justice of the peace invests the circuit court with power to hear and determine the case anew; and the appeal operates as a voluntary entry of appearance by the appellant in the circuit court, and if there is any defect in the summons or in the service thereof it is thereby waived. [Overruling *Meyer v. Ins. Co.*, 184 Mo. 1, c. 488, and subsequent cases.] *Cudahy Pack. Co. v. Ry. Co.*, 452.
13. **Additional Abstract.** Where appellant filed her abstract thirty days before the case was for hearing on the docket, an additional abstract filed by respondent two days before said docket date is barred from consideration by Rule 11. Nor can it be considered if no part of the record as a bill of exception. *Wagoner v. Wagoner*, 567.

ARGUMENT TO JURY. See **Attorneys**.

ATTORNEYS.

- 1 **Opening Statement.** It is not incompetent for the prosecuting attorney to mention any fact in his opening statement which he can

ATTORNEYS—Continued.

- prove and it is competent for him to prove. It was not improper for the prosecuting attorney in his opening statement to state that defendant had attempted to spirit away the prosecutrix, since it was proper to prove that fact and there was evidence tending to prove it. *State v. Howe*, 1.
2. ———: ———: **Power to Represent Plaintiff.** In a collateral attack on a former agreed judgment rendered in behalf of plaintiff, an allegation that certain attorneys did not represent him in said former action is effectually disposed of by a recital in said judgment that said attorneys appeared for him. *Abernathy v. Mo. Pac. Ry. Co.*, 30.
3. ———: **Judgment: Questioning Authority of Attorney for City.** The city is the only party that can question the authority of an attorney who appeared and filed an answer to a creditor's petition to recover judgment against the city. *State ex rel. City of Jefferson v. Hackmann*, 166.
4. ———: ———: **Appointment of Acting City Attorney.** Under an ordinance providing that in case of his absence from the city, the city attorney may, with the approval of the mayor and at his own expense, appoint some competent attorney to act in his stead during such absence, an attorney appointed by the city attorney, whose appointment is approved by the mayor, has authority to represent the city in a suit brought by a creditor to recover judgment against the city for a debt due. Section 18 of Article 2 of the Constitution is no authority for questioning the acts of an attorney so appointed. *Ib.*
5. **Disbarment: Indictable Offense.** A final judgment disbarring an attorney from practicing law on a charge that he has been guilty of an indictable offense, but not charging that he has been indicted and convicted, cannot be rendered, but before he can be finally disbarred the court hearing the disbarment proceeding must await the determination of the indictable offense in the court having charge of such criminal case. *Jones v. Sanderson*, 176.
6. ———: ———: **Suspension: Final Judgment.** Where the information in a disbarment proceeding charges an indictable offense, but does not charge a trial and conviction, the power of the trial court is limited to a mere suspension of the attorney from practice until the facts can be ascertained in a trial upon an indictment. But a judgment disbarring an attorney for a period of twelve months from and after a certain date and finally disposing of the case, adding thereto a judgment for costs against him, is not a suspension, but a final judgment, and one the trial court had no power to render before an indictment and conviction. A suspension for a fixed term is not a judgment of suspension under the statute. *Ib.*
7. ———: ———: **Power to Hear the Facts.** Where the information in the disbarment proceeding charges against an attorney indictable offenses, the court hearing the disbarment proceeding is without power to hear and determine the facts, but that power is by the statute placed in the court having charge of the criminal offenses mentioned in said information. *Ib.*

ATTORNEYS—Continued.

8. **Disbarment: Indictable Offense: Jurisdiction: Waiver.** In a disbarment proceeding based upon an information charging an attorney with an indictable offense only, the circuit court is without power to hear and determine the facts tending to show him guilty of such offense; and if the court, nevertheless, proceeds to hear said facts and enters final judgment of disbarment based thereon, said judgment is in excess of its jurisdiction, and the attorney does not waive excessive jurisdiction by proceeding to trial, for there can be no waiver where the court is without power to hear and determine the facts. *Ib.*
9. ———: ———: **Evidence.** Where the petition for disbarment rests upon indictable offenses, the only proof which will justify a permanent disbarment, or a fixed term of suspension, is a judgment of guilt from a court which tried the case upon the indictment and heard the facts offered to sustain it. *Ib.*
10. **Argument to Jury: Comment on Evidence.** Where evidence to show plaintiff's physical condition in a certain particular is competent under the pleadings, comment upon such condition in the argument of her attorney to the jury is not improper. *Mayne v. K. C. Rys. Co.*, 235.
11. ———: ———: **Mental Suffering.** Mental suffering as an incident to personal physical injury is always an element of damage to be considered by the jury, and it is unnecessary to make specific proof of mental suffering, because it necessarily arises when the nature and extent of the physical injury is shown; and where such injury is shown, it is not error for plaintiff's counsel, in his argument to the jury, to comment on her mental suffering. *Ib.*
12. **Argument to Jury: Discharge.** Remarks of counsel in their argument to the jury are not reversible error unless the rulings of the court thereon are excepted to at the time they are made, and unless such exceptions are saved the court does not err in refusing to discharge the jury. *Adams v. Ry. Co.*, 535.

RAIL.

1. **Limitations: Effect of Imprisonment.** The giving of bail by a defendant in a murder charge does not stop the running of the Statute of Limitations against his civil action for libel. That "the principal is supposed to be in the bail's constant custody" is a legal fiction, and does not amount to imprisonment or physical restraint. The purpose of admitting an accused to bail is to relieve him of imprisonment, and in spite of it he is at liberty until his sureties surrender him. *Hyde v. Nelson*, 130.
2. ———: ———: **Habeas Corpus.** One who has been admitted to bail is not entitled to the writ of *habeas corpus* for the purpose of obtaining his discharge. A prisoner released on bail is at liberty, and one at liberty is not imprisoned. The fact that a defendant in a murder charge gave sufficient bail and thereafter, being wrongfully committed to jail, was discharged on *habeas corpus*, did not amount to imprisonment or prevent him from bringing his civil action for libel. *Ib.*

BONDS.

1. **Guardian's Bond: Signed by Attorney: Civil Action.** The statute of Oklahoma prohibiting licensed attorneys from signing bonds as surety "in any civil or criminal action" has no application to a guardian's bond filed in the probate court of this State. It was not given in a "civil action." *Bopst v. Williams*, 317.
2. **Public Improvements: Contract and Bond: Conformity to Ordinance.** A contract for constructing certain sewers required that the work should be begun within ten days after the contract became binding and should be prosecuted regularly and uninterruptedly with such force as to secure its full completion within ninety working days from the date of its confirmation, the time of beginning, rate of progress and time of completion being essential conditions of the contract. Compliance with this contract was secured by a bond whereby the surety agreed with the city that the contractor would well and faithfully perform the contract, the surety not being liable beyond a sum stated equal to the estimated cost of materials used and labor done on the work, and that if the work be not begun within ten days after the contract became binding and prosecuted as provided in the contract to full completion within ninety working days from its confirmation then the surety would pay the city four dollars per day as liquidated damages for such breach of the contract. *Held*, that the contract and bond complied with the ordinance providing for the work, which required the successful bidder to give a good and sufficient bond in a sum equal to the contract price for the construction of the sewer and laterals, "to be forfeited," if he should fail to complete the work under his contract within ninety days from the execution thereof. The Court of Appeals decision to the contrary and holding the tax bills issued for the cost of the work void for failure to give the bond required by the ordinance is quashed, as being in conflict with controlling decisions of the Supreme Court. *State ex rel. Ford v. Ellison*, 683.
3. ———: ———: ———: **Forfeiture.** A city ordinance providing for the construction of sewers required the successful bidder to give a bond to secure performance of his contract, "to be forfeited" if he should fail to complete the work within ninety days from the execution of the contract. The bond as given provided that the surety should pay to the city a certain sum per day "as liquidated damages" for failure to so complete the work, not to exceed in the aggregate the estimated cost of the materials used and labor done on the work. *Held*, that the bond complied with the ordinance, inasmuch as the forfeiture required by the ordinance was not a penalty as in the criminal law, but merely a right in the city to a civil proceeding to recover from the contractor or his surety its damages at the stipulated amount per day for each day's default beyond the time limited in the bond. *Ib.*
4. ———: ———: ———: ———: **Damages.** The law is settled in this State by numerous decisions of the Supreme Court, that, in suit upon penal bonds with collateral conditions, the obligee, upon breach of condition, is not entitled to judgment for the full penalty of the bond, when a less sum is actually due; and hence the obligor can discharge himself by paying what is really due with interest and costs and thereupon the cause is discontinued. *Ib.*

BONDS, REGISTRATION. See *Cities*.

CERTIORARI.

1. **Conflict in Opinions: Facts Outside of Record.** In a *certiorari* to a court of appeals, wherein it is asserted by relator that said court's ruling that the evidence was sufficient to submit the case to the jury contravened prior decisions of the Supreme Court, evidence which does not appear in the opinion of the court of appeals cannot be considered. *Ex parte Brew. Co. v. Ellison*, 139.
2. ———: **Other Decisions of Court of Appeals.** On *certiorari* to a court of appeals, conflict of its opinion with other decisions of courts of appeals cannot be made the basis of quashing said opinion. *Ib.*
3. **Evidence: Personal Injuries: Members of Family: General Objection: Repetition.** It is settled law in this State, and has been since *Dayharsh v. Railroad*, 103 Mo. l. c. 577, that, in an action for damages for personal injuries negligently inflicted, it is error to admit, over proper and timely objection, evidence of the number of plaintiff's children and who compose his family; and while the Court of Appeals so held, its ruling that a general objection was insufficient to save the point was error, and conflicts with prior decisions of the Supreme Court, in view of the fact that the evidence was incompetent for any purpose, and a general objection to it was timely made, and the general objection held inadequate by the Court of Appeals was made, not to a new question, but to a repetition of the question after the trial court had ruled the evidence admissible. *Ib.*
4. **Contrary Ruling by Court of Appeals: Exception to General Statute** The Supreme Court had ruled in *State ex rel. Garesche v. Roach*, 258 Mo. l. c. 552, that the general provisions of a statute must yield to special provisions where there is a conflict and where the general provisions of one part of the statute are inconsistent with the more specific provisions of another part; the Court of Appeals, therefore, contravened *American Yeomen*, 223 S. W. 992, that Section 6940, Revised Statutes 1919, found in the general insurance law, prevents a fraternal beneficiary association, when sued by a certificate holder, from interposing, as a defense, misrepresentations by the holder in obtaining the certificate, unless it has returned or tendered the premiums paid, since Section 6401 relates specifically to such societies and exempts them, for every purpose, from the operation of said general law. The Court of Appeals, in so ruling, further contravened the previous decision of the Supreme Court in *Hanford v. Mass. Ben. Assn.*, 122 Mo. 50, wherein, in discussing the applicability of the general insurance law in reference to misrepresentations interposed as defenses to actions upon policies issued by assessment companies, it was ruled that corporations doing business under the assessment statute are not subject to any other provisions of the general insurance law except as therein distinctly set forth. *State ex rel. American Yeoman v. Reynolds*, 169.
5. **To Court of Appeals: Conflict in Opinions.** A court of appeals is vested with power to authoritatively construe a statute, and mere erroneous interpretation thereof does not warrant a quashing of its opinion in any case; but where its construction contravenes prior decisions of the Supreme Court its opinion will be quashed upon *certiorari*, for the Constitution gives the Supreme Court supervisory jurisdiction where the court of appeals has not followed its last previous ruling. *Ib.*

CERTIORARI—Continued.

6. **To Court of Appeals: Application for: Sufficiency of.** An application for a writ of *certiorari* to review an opinion of a court of appeals on the ground of conflict with a controlling decision of the Supreme Court does not comply with rule 34 of the Supreme Court, when the application itself does not "set out the issue presented to the Court of Appeals or show wherein and in what manner the alleged conflicting ruling arose," but merely states that the decision of the Court of Appeals is in conflict with the last reported decisions of the Supreme Court on the point in issue and refers to the opinion of the Court of Appeals and suggestions in support of the application filed with the application. *State ex rel. Manker v. Ellison*, 647.
7. ———: ———: ———: **Waiver.** The respondents having waived the insufficiency of the application for the writ, and the writ having been granted and return made, the Supreme Court will consider the suggestions made by relator. *Ib.*
8. **To Court of Appeals: Function of Writ: Discretion to Grant.** The writ of *certiorari* from the Supreme Court to review a decision of a court of appeals on the ground of conflict of opinions performs a double function, viz: (1) to prevent contrariety of opinions upon questions of law and equity in this State; and (2) if sustained, to quash an adverse judgment against the applicant for the writ. The issuance of the writ, however, is discretionary with the Supreme Court. *State ex rel. Berkshire v. Ellison*, 654.
9. ———: **Must Apply Within Reasonable Time.** Neither the statutes of the State nor the rules of the Supreme Court fix the time limit for applications for writ of *certiorari* to review decisions by the Court of Appeals; but such applications must be made within a reasonable time after the decision of the Court of Appeals becomes final. *Ib.*
10. ———: ———: **What is Reasonable Time.** Inasmuch as under Section 1520, Revised Statutes 1919, and Section 15 of Article 6 of the Constitution, the Clerk of the Court of Appeals must certify to the circuit court a copy of the opinion of the Court of Appeals within thirty days after the filing of such opinion, which is construed to mean the day upon which a motion for rehearing, if one is filed, is overruled, the application for the writ of *certiorari* should, in ordinary cases, be made within such thirty days. *Ib.*
11. ———: ———: ———: **Laches.** Where application for a writ of *certiorari* to review a decision of a court of appeals on the ground of conflict with controlling decisions of the Supreme Court was not made until more than nine months after the motion for rehearing was overruled and more than seven months after the opinion of the Court of Appeals had been certified to the circuit court and judgment entered there pursuant to such opinion, and the applicant for the writ had not applied to the Court of Appeals for a stay of mandate to enable him to apply for the writ of *certiorari*, there was such delay and laches on the part of the applicant as to require the writ to be quashed. *Ib.*
12. ———: ———: ———: **Excuse.** The applicant having taken no action in the Court of Appeals to secure a stay of mandate until application could be made for the writ, it is no excuse that applicant, four months after the mandate had gone down to the circuit

CERTIORARI—Continued.

- court and judgment pursuant thereto had been entered by that court, applied to the Supreme Court for a mandamus to the Court of Appeals to so write its opinion as to state the facts, as a preliminary step toward applying for the writ of *certiorari*, which application for a mandamus was denied three months before the application for the writ of *certiorari* was made. State ex rel. Berkshire v. Ellison, 654.
13. **To Court of Appeals: Conflict of Opinions: Scope of Review.** On *certiorari* to review an opinion of a court of appeals as being in conflict with a controlling decision of the Supreme Court, the question of conflict is to be determined from the opinion of the Court of Appeals; and correlative facts on which the Court of Appeals based its ruling are referred to only as aids in more clearly understanding the court's conclusions. (Woodson, J., dissenting.) State ex rel. Ford v. Ellison, 683.
 14. ———: ———: **Error of Court of Appeals in Applying Law to Facts.** On *certiorari* to review a decision of a court of appeals alleged to be in conflict with a previous ruling of the Supreme Court it is not for the latter court to determine whether the former erred in its application of the rules of law to the facts in the record, but only whether in announcing the law of the case upon the facts as stated in its opinion the Court of Appeals failed to follow the last previous ruling of the Supreme Court. State ex rel. Pack. Co. v. Reynolds, 697.
 15. ———: ———: **Two or More Courts of Appeals.** On *certiorari* to review a decision by a court of appeals, the Supreme Court is not concerned with any conflict which may exist between opinions of any of the courts of appeals; but is only to determine whether the opinion in the case under review conflicts with a controlling decision of the Supreme Court. Ib.

CHILDREN.

1. **Illegal Marriage: Divorce: Adultery: Legitimacy of Children.** Section 342, Revised Statutes 1909, provides that "the issue of all marriages decreed null in law or dissolved by divorce shall be legitimate." In order that a child may be legitimate within the meaning of this statute, there must have been not only a marriage between the parents, but such a marriage as would be decreed null in law or dissolved by divorce in a proceeding in equity between them. In an action to annul a marriage in equity, for any reason, or for divorce, if both parties knowingly lived in adultery, there would be no marriage to annul and neither would be an innocent or injured party; neither would come into court with clean hands, and no relief could be granted to either. Unless the marriage is entered into by one or both of the parents honestly, innocently and in good faith it is not such a marriage as is contemplated by this section. Stripe v. Meffert, 366.
2. **Legitimation of Children** Section 341, Revised Statutes 1909, provides that "if a man, having by a woman a child or children, shall afterward intermarry with her and shall recognize such child or children to be his, they shall thereby be legitimated." This applies to cases where the relationship between the parties at the time the child was conceived was illegal and criminal as to both parents. In such case a subsequent legal marriage and recognition is necessary to legitimacy. Ib.

CHILDREN—Continued.

3. ———: **Adultery: Guilty Knowledge of Parties.** Where the evidence showed that both the parents were knowingly guilty of adultery, the child can not be held legitimate under Section 342 at all, and not under Section 341 unless there has been a subsequent marriage between the parents accompanied by recognition by the father. *Ib.*
4. ———: ———: **Non-Access: Presumption.** In cases where the question is whether the paramour or husband of the mother is the father of the child, the non-access of the husband is required to be shown by clear and convincing proof; otherwise, the presumption is that the husband, and not the paramour, is the father. *Ib.*

CITIES.

- 1 **Issue of Bonds: Duty of State Auditor: Reviewable Error.** While it is the duty of the State Auditor to see to it that the requirements of the applicable statutes have been complied with before registering bonds issued by a city, his errors in judgment are reviewable by the Supreme Court in mandamus. *State ex rel. City of Jefferson v. Hackmann*, 156.
2. ———: **To Pay Judgment: Notice: Describing Judgments.** The notice advising the voters that the purpose of the special election was to determine whether the city should issue its bonds in a named amount for the purpose of funding that much of the city's judgment indebtedness, was not insufficient because it did not describe the judgments. *Ib.*
3. ———: ———: **Date of Judgment Misstated.** Where judgment against the city was rendered at one term, and on motion was set aside, and at a subsequent term another judgment for the same amount was rendered, and throughout the record it is admitted that the judgments were for the same indebtedness and that the voters voted for an issue of bonds to pay the said indebtedness, the fact that the ordinance, passed after the election and authorizing the issuance of the bonds, in its preamble described the judgment entered at the first term, does not invalidate the bonds. *Ib.*
4. ———: **Tax Ordinance: Per Cent Tax.** Although the ordinance which undertakes to levy a tax to pay the interest and principal of the bonds issued by the city does not levy a per cent tax on all the property, yet if it does say that there shall be annually levied a tax which shall raise a stated amount for each year, and these amounts are fully sufficient to meet the interest and the sinking fund, it meets the requirements of the Constitution. But even if it were an insufficient levy of a tax, that would not invalidate the bonds, because the city can be compelled, by the self-enforcing provision of the Constitution, to provide for the payment of the interest and principal as they become due. *Ib.*
5. ———: **Indebtedness: Presentation of Written Claims.** A contention that the statute (Sec. 8313, R. S. 1919) required the claims against the city for an indebtedness should have been presented in writing verified by the claimants, is without force where the record shows the indebtedness was reduced to judgments in the circuit court; for all defenses to the claims were foreclosed by such judgments. *Ib.*

CITIES—Continued.

6. **Issue of Bonds: Judgments: Defective Process: Waiver: Appearance**
The question whether process should have been served upon the mayor rather than the city clerk, in the suit by a creditor to recover judgment against the city, dropped out of the case when the attorney for the city appeared and filed answer. State ex rel. City of Jefferson v. Hackmann, 156.
7. ———: ———: **Questioning Authority of Attorney for City.** The city is the only party that can question the authority of an attorney who appeared and filed an answer to a creditor's petition to recover judgment against the city. Ib.
8. ———: ———: ———: **Appointment of Acting City Attorney.** Under an ordinance providing that in case of his absence from the city, the city attorney may, with the approval of the mayor and at his own expense, appoint some competent attorney to act in his stead during such absence, an attorney appointed by the city attorney, whose appointment is approved by the mayor, has authority to represent the city in a suit brought by a creditor to recover judgment against the city for a debt due. Section 18 of Article 2 of the Constitution is no authority for questioning the acts of an attorney so appointed. Ib.
9. **City Indebtedness: Maximum Limit: Last Previous Assessment.** The assessment mentioned in Section 12 of Article 10 of the Constitution limiting the indebtedness that a city of the third class may incur in any year to "five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness," means a complete assessment, and the words "previous to the incurring of such indebtedness" mean previous to the authorization of the indebtedness at the election held by the voters of the municipality. So that where the election was held on September 16, 1919, and the State Board of Equalization had not completed the equalization of the 1918 assessment and certified its action thereon previous to said September 16, 1919, the assessment of 1916 was the "next before the last assessment," and must be used as the measuring rod in determining whether the bonds authorized at such election, added to the city's then existing indebtedness, exceeded five per cent of the value of the taxable property therein. State ex rel. Carthage v. Hackmann, 184.
10. ———: ———: **Existing Indebtedness: For City Waterworks.** In determining whether bonds authorized at an election to be issued by a city exceeds the five per cent of the value of the taxable property mentioned in Section 12 of Article 10 of the Constitution, existing indebtedness due to the issuance of bonds for the construction of municipal waterworks is not to be considered. In view of Section 12a and the amendment of said Section 12a adopted in 1920, the indebtedness authorized by said Section 12a for the purpose of constructing or purchasing waterworks, electric or other light plants, to be owned exclusively by the city, is not to be treated as a part of the existing indebtedness in determining the validity of a subsequent issue of bonds under the authority of Section 12 of Article 10. [Overruling State ex rel. Columbia v. Wilder, 197 Mo. 1.] Ib.
11. **Constitutional Law: Title: Construction.** The constitutional provision requiring the subject of a law to be clearly expressed in

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- its title must be reasonably and liberally construed and applied, due regard being had to its object and purpose, the principal purpose being to prevent surprise and fraud upon the members of the General Assembly by barring the insertion of matter in the body of the bill of which the title gives no intimation. *Asel v. City of Jefferson*, 195.
12. ———: ———: **Subject: General.** So long as the title to a law does not cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection, it is not subject to an objection for generality. *Ib.*
 13. ———: ———: ———: **Reference to Prior Statute.** The mere reference in the title of an act to a previous act, without other description of the subject-matter, gives notice that the new section to be enacted will deal with the same subject contained in the section to be repealed. So that where the title of the Act of 1915 was, "An Act to amend Chapter 84, Article 4, of the Revised Statutes of the State of Missouri, 1909, in relation to municipal corporations by adding thereto a new section to be known as Section 9237a," the title to the Act of 1919, which was, "An Act to repeal 'An Act to amend Chapter 84, Article 4, of the Revised Statutes of Missouri 1909,' in relation to municipal corporations as it appears in the Laws of Missouri, 1915, at page 359, and approved March 24, 1915, and to enact a new section in lieu thereof to be known as Section 9237a," did not violate the constitutional provision requiring the subject of a law to be clearly expressed in its title, although the Act of 1915 provided only for the sprinkling and oiling of streets, and the Act of 1919, in addition to providing for the sprinkling and oiling of streets, provided for their repairing, surfacing and re-surfacing. *Ib.*
 14. ———: ———: ———: ———: **Caption or Head-Note of Prior Act.** By the title of said Act of 1919 the members of the Legislature were informed that the bill related to municipal corporations and proposed to repeal an act amending Chapter 84 of Article 4 of the Revised Statutes of 1909, appearing in the Laws of 1915, at page 359, and to enact a new section in lieu thereof, and by reference thereto their attention was directed to said Act of 1915; and by turning to the Act of 1915, they would have found its caption or head-note to be: "Municipal Corporations—Cities of the Third Class—Oiling and Sprinkling Streets—Special Tax Bills," which, for the purposes of such reference, became a part of the title to the Act of 1919, then under consideration, and they would thereby have been specifically informed as to the general subject and nature of the legislation sought to be enacted by the Act of 1919; and since the caption or head-note of the Act of 1915 referred to the "oiling and sprinkling of streets," the legislators, by referring to it, would readily have realized that the subject of the new section to be enacted by the proposed Act of 1919 would necessarily relate to the care and maintenance of streets, a subject closely related thereto; and since the body of the Act of 1919 continued to treat of the "oiling and sprinkling" of streets, together with the kindred subject of "repairing surfacing and re-surfacing" thereof, it cannot be held that the Legislature was misled by the title of the Act of 1919, or that said title did not give notice that the body of the Act of 1919 would contain additional provisions for repairing, surfacing a re-surfacing of streets. *Ib.*

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15. **Constitutional Law: Title: Congruous Subjects.** The "repairing, surfacing and re-surfacing" of streets are cognate and related to the "oiling and sprinkling" of streets. *Asel v. City of Jefferson*, 195.
16. **Conflicting Statutes: Resurfacing and Reconstruction of Streets: Later Enactment: Remonstrance.** Although the Act of 1919 conflicts with Sections 9254 and 9255 of the Act of 1911, Laws 1911, pages 337-341, since the two acts provide for an entirely different method of procedure as to the paving and re-surfacing of streets, and in that respect are inconsistent and both cannot operate together, yet the Act of 1919, being a later enactment, necessarily repeals the Act of 1911, and proceedings for resurfacing a street based on the Act of 1919 are not invalid because of said conflict, notwithstanding the Act of 1911 makes provision whereby resident owners may protest against any proposed paving, while the Act of 1919 contains no such provision. *Ib.*
17. **Street Improvement: Unequal Assessment.** Proceedings for the improvement of a street are not invalid because all property owners will be charged the same amount per front foot, regardless of whether the street in front of the particular property is entirely resurfaced or only holes or depressions therein are patched, the proposed contract being for the whole improvement, and the cost to be defrayed by a special tax bill on the property fronting or abutting on the streets where the work is done, in the proportion that the linear feet of each lot fronting thereon bears to the total number of linear feet of all property chargeable with the cost. All property in the improvement district is benefited alike and all should bear proportionately the cost, without regard to what particular work is done in front of a given lot; and there is no such unequal assessment as renders the proceeding invalid. *Ib.*
18. ———: **Tax Bills to Contractor.** Under the Act of 1919 special tax bills for the re-surfacing of a street may be issued directly to the contractor doing the work, or to the city and by it assigned to the contractor. *Ib.*
19. **Negligence: Injury to Pedestrian.** Unless the ground upon which a pedestrian was walking at the time she fell down a series of steps was a public highway, she cannot recover damages from the city. *Cochran v. Wilson*, 210.
20. ———: ———: **Steps on School Ground.** The space between a school building and a theatre was paved with granitoid and used as a thoroughfare by pedestrians passing from the street in front of the buildings to the next parallel street. The space was school ground, and in it was a series of four or five granitoid steps leading down to an entrance to the theatre. The grounds were unlighted, and plaintiff, walking along the paved passageway at night, fell down the steps and was injured. *Held*, that the liability of the city is dependent upon whether the space can be classed as a public highway, and it could become a public highway only by condemnation, formal dedication or adverse user. *Ib.*
21. ———: **Highway: School Grounds: Condemnation.** The land on which the steps were located where plaintiff fell and was injured being the property of the Board of Education, it could not be condemned as a highway, having already been devoted to a public use. *Ib.*

CITIES—Continued.

22. ———: ———: ———: **Adverse User.** The statute providing that statutes of limitation shall not extend to lands given, granted, sequestered or appropriated to any public, pious or charitable use, nor to any lands belonging to the State, a strip of land belonging to the Board of Education and used as a necessary appurtenance to one of its school buildings cannot become a public highway by adverse user. Besides, even if by adverse user, it could become a public highway, there was no showing of such continuous use for a term of years as caused it to ripen into a prescriptive right to use the passageway as a highway. *Ib.*
23. **Damages: Grade of Street: Waiver: Estoppel.** Where there was embodied in the deed of dedication of a sub-division a clause to the effect that "all avenues and alleys laid out in said sub-division, and for better identification etched on the above plat, are hereby dedicated to public use forever, and any claims for damages which may arise by reason of changing the present surface of said avenues and alleys to conform to such grades as may hereafter be established by the city, are hereby waived," and said deed of dedication was accepted by the city and duly recorded, and thereafter the grade of one of said avenues was changed to seven feet below the natural surface, after plaintiffs, with notice, bought lands abutting thereon from the dedicator, they are estopped to claim damages contrary to said waiver. *Stapenhorst v. St. Louis, 285.*
24. ———: ———: ———: **Consideration: Acceptance.** The acceptance by the city of a deed dedicating streets to public use and containing a waiver of damages for changes in the grade is in itself a sufficient consideration to sustain both the dedication and waiver. *Ib.*
25. ———: ———: ———: **Damages to Abutting Property.** The Constitution of 1875, in declaring that private property cannot be taken or damaged for public use without just compensation, did not prevent a proprietor of a sub-division of land, who wishes to subdivide it into blocks, streets, lots and alleys, from expressly authorizing the city, in the deed of dedication, to grade the streets without paying damages to abutting property. By his deed of dedication, the proprietor may give up his right to compensation, for the uses included in the dedication, both for the taking of the property used as the street and for damages to the adjoining property resulting from such use. *Ib.*
26. ———: ———: ———: **Running With Title: Easement.** Where the owner of land by his deed of dedication gives and dedicates to the public an easement to use and grade the land embraced in the street without the payment of damages to the dedicator's adjoining land, and such deed is accepted by the city and is acknowledged and recorded, subsequent purchasers from such owner of lots abutting on the street take title subject and servient to such public easement, which becomes an encumbrance upon their lots and runs with the title. The city's right to grade without paying damages, in such case, is an easement, and not a mere revokable license. *Ib.*
27. ———: ———: ———: **Coerced by City: Evidence.** That the board of public improvements refused to approve the plat of the sub-division unless the deed of dedication contained a release of

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damages for subsequent grading of the streets, can only be shown by its records; for neither the city nor the public is bound to take knowledge of its acts or words unless they are of record. *Stapenhorst v. St. Louis*, 285.

28. **Damages: Grade of Street: Waiver: Power of Board: Abuse of Discretion.** Under the old charter of St. Louis declaring that "the Board of Public Improvements shall have authority to approve maps or plat of sub-divisions which fully dedicate to the public use, streets, alleys and public places," said board had authority to accept a deed of dedication or plat waiving damages for subsequent grading of the streets so dedicated, and having such authority it did not abuse its discretion by refusing to approve such plat or deed unless it contained a waiver of such damages. *Ib.*
29. ———: ———: ———: **Ultra Vires.** The acceptance by the City of St. Louis of a deed of dedication containing a waiver of damages for subsequent change in the grade of streets is not beyond the power of the city, nor of any statute, nor of any provision of the Constitution. And since the statute expressly provides that when property owners lawfully entitled to damages for grading a street "shall not have waived all right or claim thereto" ordinances providing for such grading shall also provide for ascertaining and paying the damages, there is no more proper or timely way of making a waiver of such damages than in the deed of dedication. *Ib.*
30. **Constitutional Law: City Ordinance Requiring Vigilance in Operating Street Cars.** It is well settled by the decisions of this court that city ordinances are valid which impose upon motormen operating street cars in the city the duty of keeping a vigilant watch for persons on the track or moving toward it, and of stopping the car on the first appearance of danger in the shortest time and space possible, and of ringing the gong in quick succession on approaching any team or person. *Hale v. St. Joseph Ry. Co.*, 499.
31. **Timely Warning: Awaiting Apparent Peril.** Under the vigilant watch ordinance in evidence the motorman cannot delay the sounding of his gong in quick succession until persons, teams or vehicles are actually going upon the track in front of his approaching street car or are in an actual position of danger; he must take affirmative action to give them timely warning of his approach. *Ib.*
32. **Public Improvements: Contract and Bond: Conformity to Ordinance.** A contract for constructing certain sewers required that the work should be begun within ten days after the contract became binding and should be prosecuted regularly and uninterruptedly with such force as to secure its full completion within ninety working days from the date of its confirmation, the time of beginning, rate of progress and time of completion being essential conditions of the contract. Compliance with this contract was secured by a bond whereby the surety agreed with the city that the contractor would well and faithfully perform the contract, the surety not being liable beyond a sum stated equal to the estimated cost of materials used and labor done on the work, and that if the work be not begun within ten days after the contract became binding and prosecuted as provided in the contract to full completion within ninety working days from its confirmation

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then the surety would pay the city four dollars per day as liquidated damages, for such breach of the contract. *Held*, that the contract and bond complied with the ordinance providing for the work, which required the successful bidder to give a good and sufficient bond in a such equal to the contract price for the construction of the sewer and laterals, "to be forfeited," if he should fail to complete the work under his contract within ninety days from the execution thereof. The Court of Appeals decision to the contrary and holding the tax bills issued for the cost of the work void for failure to give the bond required by the ordinance is quashed, as being in conflict with controlling decisions of the Supreme Court. *State ex rel. Ford v. Ellison*, 683.

33. ———: ———: ———: **Forfeiture.** A city ordinance providing for the construction of sewers required the successful bidder to give a bond to secure performance of his contract, "to be forfeited" if he should fail to complete the work within ninety days from the execution of the contract. The bond as given provided that the surety should pay to the city a certain sum per day "as liquidated damages" for failure to so complete the work, not to exceed in the aggregate the estimated cost of the materials used and labor done on the work, *Held*, that the bond complied with the ordinance, inasmuch as the forfeiture required by the ordinance was not a penalty as in the criminal law, but merely a right in the city to a civil proceeding to recover from the contractor or his surety its damages at the stipulated amount per day for each day's default, beyond the time limited in the bond. *Ib.*
34. ———: ———: ———: ———: **Damages.** The law is settled in this State, by numerous decisions of the Supreme Court, that, in suit upon penal bonds with collateral conditions, the obligee, upon breach of condition, is not entitled to judgment for the full penalty of the bond, when a less sum is actually due; and hence the obligor can discharge himself by paying what is really due with interest and costs and thereupon the cause is discontinued. *Ib.*

CONDEMNATION. See **Highways.**

CONFISCATION.

1. **Public Utility: Compulsory Service: Reasonableness.** An electrical company is not required to furnish electricity to every village and hamlet within the boundaries of its professed service, unless such requirement is reasonable; and the reasonableness of an order of the Public Service Commission requiring it to serve a certain town depends on whether it is arbitrary, capricious or unlawful. And, where the facts demonstrate that the order is neither arbitrary nor capricious, it can be held to be unlawful only on the ground that it will operate to take the company's property for a public use without just compensation. *State ex rel. Power Co. v. Publ. Serv. Comm.*, 522.
2. ———: ———: ———: **Unlawful: Just Compensation.** Where the order of the Public Service Commission requiring an electrical company to distribute and sell electricity to the inhabitants of a certain town does not appropriate such property to a public use to which the company has not already dedicated it, and the evidence shows that furnishing the service will not entail even a

CONFISCATION—Continued.

present financial loss, and that the gross revenue will be sufficient to cover depreciation and the cost of operation and to insure an adequate return on the investment, the order cannot be held to operate to take the company's property for a private use without just compensation, but is a reasonable and lawful one. *State ex rel. Power Co. v. Publ. Serv. Comm.*, 522.

3. **Public Utility: Compulsory Service: Choosing Towns Within Selected Territory.** Where the effect of its occupying a selected territory by a public service corporation is to exclude therefrom other public service utilities and to leave unserved the communities therein it does not choose to serve, it will not be permitted to pick and choose and serve only the portion of the territory covered by its franchise which is presently profitable to it. *Ib.*

CONFLICT IN OPINION. See *Certiorari*.

CONGRESS, POWERS OF. See *Negotiable Instruments*, 13 to 17.

CONSTITUTIONAL LAW.

1. **Constitutional Question: Preserved for Review.** If the constitutional question was raised only by a motion to quash the information, and the bill of exceptions fails to show that a motion to quash was filed or overruled, the question is not for consideration on appeal. *State v. Howe*, 1.
2. **Laws: Retrospective Operation: Remedy.** The provision of the Constitution declaring that no law "retrospective in its operation can be passed by the General Assembly" applies only to acts which would affect vested rights, and not to statutes which are remedial only. No one has a vested interest in the form of procedure; no one has a vested right to have his cause tried by any particular mode. Acts changing remedies in any way that does not destroy or impair vested rights are excluded from the operation of said constitutional provision, even when they are intended to apply to existing conditions. The remedy applies to the future, but as a remedy it may operate upon property rights and interests already vested. To be retrospective in the constitutional sense it must impair a vested right. *McManus v. Park*, 109.
3. ———: ———: ———: **Annual Accounting of Trustees.** The Act of 1911 (now Secs. 13429 and 13430, R. S. 1919), requiring a trustee vested with the title to an estate to make an annual report to the circuit court, applies only to procedure, is remedial in its operation, and does not affect the rights of a trustee who became vested with the estate prior to its enactment. Such trustee has no vested right in the manner of accounting for his trust. *Ib.*
4. ———: ———: **Act of 1911: Ambiguous Terms: Construction: Remedy.** Where a statute is ambiguous in its terms and affects substantive or vested rights, all ambiguity therein will be resolved in favor of its prospective operation and its constitutionality; but where the statute relates to the remedy and is ambiguous or of doubtful application, it is liberally construed in order to effectuate the purpose of its enactment, and to that end all doubts are resolved so as to affect past as well as future transactions. The evident purpose of the Act of 1911, requiring trustees to make annual reports to the circuit court, was that said remedy should apply to all trustees, whether appointed by the court before or after its enactment. It applies to a will disposing of an estate

CONSTITUTIONAL LAW—Continued.

before as well as after the passage of the act, and it applies where a trustee appointed by the will "has become disqualified to act, resigned or died," and it applies to trustees appointed by the court before the act was passed. *Ib.*

5. ———: **Title.** Where the terms of an act are ambiguous, recourse may be had to its title to ascertain the intention of the Legislature; and the intention expressed in the title of the Act of 1911, requiring trustees to report annually to the circuit court the condition of the estate, clearly shows it is retroactive in its operation, and applies to all trustees. *Ib.*
6. ———: **Constitutional Question: Not Raised at Trial.** A contention that an act is unconstitutional as class legislation, if the question was not raised in the trial court, cannot be considered on appeal; on the contrary, appellant can appropriately urge on appeal a construction of the statute which will render it constitutional, if that contention was made below. *Ib.*
7. **City Indebtedness: Maximum Limit: Last Previous Assessment.** The assessment mentioned in Section 12 of Article 10 of the Constitution limiting the indebtedness that a city of the third class may incur in any year to "five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness," means a complete assessment, and the words "previous to the incurring of such indebtedness" mean previous to the authorization of the indebtedness at the election held by the voters of the municipality. So that where the election was held on September 16, 1919, and the State Board of Equalization had not completed the equalization of the 1918 assessment and certified its action thereon previous to said September 16, 1919, the assessment of 1916 was the "next before the last assessment," and must be used as the measuring rod in determining whether the bonds authorized at such election, added to the city's then existing indebtedness, exceeded five per cent of the value of the taxable property therein. *State ex rel. Carthage v. Hackmann, 184.*
8. ———: ———: **Existing Indebtedness: For City Waterworks.** In determining whether bonds authorized at an election to be issued by a city exceeds the five per cent of the value of the taxable property mentioned in Section 12 of Article 10 of the Constitution, existing indebtedness due to the issuance of bonds for the construction of municipal waterworks is not to be considered. In view of Section 12a and the amendment of said Section 12a adopted in 1920, the indebtedness authorized by said Section 12a for the purpose of constructing or purchasing waterworks, electric or other light plants, to be owned exclusively by the city, is not to be treated as a part of the existing indebtedness in determining the validity of a subsequent issue of bonds under the authority of Section 12 of Article 10. [*Overruling State ex rel. Columbia v. Wilder, 197 Mo. 1.*] *Ib.*
9. **Constitutional Construction.** The rules laid down by the courts for the construction of constitutional provisions are the same as those governing the construction of statutes. *Ib.*
10. ———: **Adoption of Judicial Construction: Subsequent Legislative Construction.** It is a mere legal fiction that when the people

CONSTITUTIONAL LAW—Continued.

- adopted an amendment to a section of the Constitution they adopted the construction previously placed upon it by the Supreme Court; but the necessity of adopting that legal fiction is avoided by a legislative act, passed prior to the adoption of the amendment, which places a meaning on the constitutional provision different from that previously placed upon it by judicial construction. *State ex rel. Carthage v. Hackmann*, 184.
11. **Title: Construction.** The constitutional provision requiring the subject of a law to be clearly expressed in its title must be reasonably and liberally construed and applied, due regard being had to its object and purpose, the principal purpose being to prevent surprise and fraud upon the members of the General Assembly by barring the insertion of matter in the body of the bill of which the title gives no intimation. *Asel v. City of Jefferson*, 195.
 12. ———: **Subject: General.** So long as the title to a law does not cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection, it is not subject to an objection for generality. *Ib.*
 13. ———: ———: **Reference to Prior Statute.** The mere reference in the title of an act to a previous act, without other description of the subject-matter, gives notice that the new section to be enacted will deal with the same subject contained in the section to be repealed. So that where the title of the Act of 1915 was, "An Act to amend Chapter 84, Article 4, of the Revised Statutes of the State of Missouri, 1909, in relation to municipal corporations, by adding thereto a new section to be known as Section 9237a," the title to the Act of 1919, which was, "An Act to repeal 'An Act to amend Chapter 84, Article 4, of the Revised Statutes of Missouri, 1909,' in relation to municipal corporations as it appears in the Laws of Missouri, 1915, at page 359, and approved March 24, 1915, and to enact a new section in lieu thereof to be known as Section 9237a," did not violate the constitutional provision requiring the subject of a law to be clearly expressed in its title, although the Act of 1915 provided only for the sprinkling and oiling of streets, and the Act of 1919, in addition to providing for the sprinkling and oiling of streets, provided for their repairing, surfacing and re-surfacing. *Ib.*
 14. ———: ———: ———: **Caption or Head-Note of Prior Act.** By the title of said Act of 1919 the members of the Legislature were informed that the bill related to municipal corporations and proposed to repeal an act amending Chapter 84 of Article 4 of the Revised Statutes of 1909, appearing in the Laws of 1915, at page 359, and to enact a new section in lieu thereof, and by reference thereto their attention was directed to said Act of 1915; and by turning to the Act of 1915, they would have found its caption or head-note to be: "Municipal Corporations—Cities of the Third Class—Oiling and Sprinkling Streets—Special Tax Bills," which, for the purposes of such reference, became a part of the title to the Act of 1919, then under consideration, and they would thereby have been specifically informed as to the general subject and nature of the legislation sought to be enacted by the Act of 1919; and since the caption or head-note of the Act of 1915 referred to the "oiling and sprinkling of streets," the legislators, by referring to it, would readily have realized that the subject of the new section

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to be enacted by the proposed Act of 1919 would necessarily relate to the care and maintenance of streets, a subject closely related thereto; and since the body of the Act of 1919 continued to treat of the "oiling and sprinkling" of streets, together with the kindred subject of "repairing, surfacing and re-surfacing" thereof, it cannot be held that the Legislature was misled by the title of the Act of 1919, or that said title did not give notice that the body of the Act of 1919 would contain additional provisions for repairing, surfacing and re-surfacing of streets. *Ib.*

15. ———: **Congruous Subjects.** The "repairing, surfacing and re-surfacing" of streets are cognate and related to the "oiling and sprinkling" of streets. *Ib.*
16. **City Ordinance Requiring Vigilance in Operating Street Cars.** It is well settled by the decisions of this court that city ordinances are valid which impose upon motormen operating street cars in the city the duty of keeping a vigilant watch for persons on the track or moving toward it, and of stopping the car on the first appearance of danger in the shortest time and space possible, and of ringing the gong in quick succession on approaching any team or person. *Hale v. St. Joseph Ry. Co., 499.*

CONTINUANCE.

1. **Instruction: Affidavit for.** Where defendant filed its application for a continuance, based on the absence of a witness, and set up therein the facts such witness would testify if he were present, which were substantial and material to the issues, and plaintiff agreed that if such witness were present he would testify to those facts, the defendant is entitled to an instruction telling the jury that the evidence of such absent witness, as contained in said affidavit and read to them, is entitled to and should be given the same weight and credit they would give it if said witness were personally present and testified to the same facts. *Jones v. Frisco Ry. Co., 64.*
2. ———: The granting and refusing of continuances is largely a matter of the discretion of the trial court, and unless a clear abuse of its discretion is shown its action will not be interfered with. *Seelig v. M., K. & T. Ry. Co., 343.*

CONTRACTS.

1. **Purchase of Land: Oral Contract: Specific Performance.** The Statute of Frauds is an insuperable barrier to the enforcement of an oral contract for the purchase of land, unless the proof of such contract is so clear, cogent and convincing as to leave no reasonable doubt in the mind of the chancellor as to its terms and conditions; and where part performance is relied upon to take the case out from under the operation of the statute, there must be like proof that the acts performed refer to the contract and would not have been done unless on account of and in pursuance to it and with a direct view to its performance. *Scheerer v. Scheerer, 92.*
2. ———: ———: **Part Performance: Possession.** Taking and continuing in possession by the vendee under an oral contract for the purchase of land. *287 Mo.—47*

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chase of land, with the vendor's consent, the payment of a substantial part or all of the purchase price, and the making of substantial improvements, are acts of performance when referable solely and unequivocally to the contract. The taking of possession alone is not generally recognized as sufficient part performance, but taking possession, followed by the further act of part payment, or the making of improvements, is sufficient to validate the parol contract. *Scheerer v. Scheerer*, 92.

3. **Purchase of Land: Oral Contract: Part Performance: Signing Deed.** Where the vendee made substantial part payment, went in possession, made valuable improvements, and afterwards made other substantial part payments, all referable solely to the parol contract of purchase, and a receipt for a large payment was given with the vendor's name attached thereto, and his testimony as to whether he signed the receipt is evasive, and he signed a deed in exact harmony with and in pursuance to the parol agreement, which he refused to deliver and accept a deed of trust for the balance, the evidence showing that a desire to avoid taxes being controlling, the contract will be specifically enforced, there being no other rational hypothesis on which the signing of the deed can be explained. *Ib.*
4. ———: ———: **Indefinite Terms: Cured by Interpretation.** An objection that the parol contract pleaded is indefinite as to the payments to be made by the vendee before the vendor would make a deed, is cured by an allegation and proof that on the making of certain payments the vendor agreed to make a deed, which he did sign but did not deliver, for this was an interpretation of the contract which made it definite. *Ib.*
5. ———: ———: **Time of Payment: Interest as Compensation for Delay.** Where the time of payment of the purchase price of land was optional with the vendee, as it suited his convenience, the law implies a reasonable time; and where the vendor accepted a second payment five years after the sale, time was not of the essence of the contract. And ordinarily, where the time of payment of the purchase is optional with the vendee, the payment of interest on the deferred payments will be sufficient compensation for the delay. *Ib.*
6. **Husband and Wife: Contract Looking to Divorce Void: Non-Severable Clauses.** A married couple entered into a contract whereby the husband agreed to pay the wife \$200 per month during the rest of her life unless she should decide that she wished to remarry, in which case he was to secure a divorce on the grounds of desertion, the monthly payment to start as soon as the wife should leave him and to cease when he should be notified of her desire to remarry. Other clauses provided that he should keep alive a certain \$12,000 policy of life insurance for her benefit, to be discontinued, however, upon her remarriage; that if he died first she should inherit all his property, provided she had not remarried in the meantime; that she should at any time sign any deed, or other instrument necessary to enable him to conduct his real estate or other business; that she should in no way interfere with or obstruct him in the conduct of his business; that in case of her remarriage she should transfer to him all her rights in his property and in any property that they might have conjointly; that she would sign no legal paper of any kind without his permission, and would incur no debt to be paid by him; and that the

CONTRACTS—Continued.

- furniture in the flat then occupied by them should be sold and the proceeds divided equally between them. *Held, first*, that this contract in its entirety was void, because it was intended to promote and facilitate a divorce; and, *second*, that the other provisions could not be validated by eliminating the divorce clause, since the contract was not severable. *Beardsley v. Bass*, 393.
7. **Corporation: Ultra Vires: Enforcement of Executed Contract.** It is the settled rule of law in Missouri that the defense of *ultra vires* is not admissible to prevent the enforcement of the contract of a corporation, where the contract has been fully executed on one side, unless it is a contract expressly prohibited by law; and this principle extends to executed contracts for the purchase by a corporation of goods in which the corporation has no authority to deal; and it permits recovery of the price of such goods, purchased and delivered. *Brew. Co. v. Poultry & Game Co.*, 400.
8. ———: **Estoppel.** The provision of Section 9749, Revised Statutes 1919, and Section 7, Article 12, of the Constitution of Missouri, that no corporation shall engage in business other than that expressly authorized in its charter, or the law under which it may have been or may hereafter be organized, does not prevent the application of the doctrine of estoppel. *Ib.*
9. **Statute of Frauds: Oral Contract of Sale: When Valid.** In an action to recover the balance due on an oral contract for goods sold and actually delivered, amounting to \$9472.50, the fact that the contract was not by its terms to be performed within one year is no defense. *Ib.*
10. **Executed: Mutuality.** Where a contract for the delivery of beer, while it prescribed the terms of payment by the purchaser and set forth many other details, did not obligate the brewer to make deliveries, but he did in fact, for a series of years, make such deliveries, in large quantities: *Held*, that, in an action by the brewer to recover a balance for the beer delivered, want of mutuality was not admissible as a defense; the shipments and acceptance supplied the consideration to support the contract. *Ib.*
11. **Sale of Goods: Bond: Case Adjudged.** In the year 1905, a corporation organized for the purpose of dealing in dressed poultry, game and country produce, executed a bond with sureties which recited that it had agreed to purchase beer from a brewing company for a period of ten years, and to sell this company's beer to the exclusion of all other malt beverages, and that the brewing company consented to sell and ship beer to the Poultry & Game Company, from time to time, as needed in its business, at prices agreed upon; that the Brewing Company reserved the right to charge any or all of the prices from time to time, without notice to the purchaser or its sureties; and that it also reserved the right to terminate the agreement to sell beer at any time without notice. The bond further recited that the Brewing Company had agreed to extend to the purchaser a standing credit of \$10,000. The Brewing Company did not sign this bond or the contract recited in it, but did for a period of six years furnish beer in large amounts, as ordered. *Held, first*, that the contract, not being expressly prohibited by law, and not being *malum in se*, or contrary to public policy at the time it was made, was enforceable against the Poultry & Game Company and its sureties, although not signed

CONTRACTS—Continued.

by the Brewing Company; *second*, the fact that the contract was not to be wholly performed within one year was no defense; and *third*, the contract was not void for want of mutuality, the Poultry & Game Company having accepted the beer. *Brew. Co. v. Poultry & Game Co.*, 400.

CONVEYANCES.

1. **Curtesy: Deed by Wife Alone.** The estate of the husband, both by the curtesy initiate and by the curtesy consummate, is completely wiped out by a conveyance by the wife of her separate real estate during her lifetime, regardless of his failure or refusal to join in her deed. *Brook v. Barker*, 13.
2. **Deposit of Deed With Bank: Agent or Trustee.** The physical delivery of a deed to a bank, accompanied by written instructions that it was to be delivered to the grantee upon the grantor's death, and the grantor's contemporaneous and subsequent declarations to the effect that he had deeded everything he had to the grantee and wanted her to have it at his death, created no relation of agency between the bank and the grantor, but the deposit being unconditional the bank, in accepting it, became a trustee of an express trust and as such charged with the performance of the duties defined for the grantor and the grantee. *Meredith v. Meredith*, 250.
3. ———: **Delivery Upon Grantor's Death.** A delivery of a deed by the grantor to a third party to be held by him and delivered to the grantee upon the grantor's death will operate as a valid delivery, where no reservation is made in the deed nor any right of control over the instrument is retained by the grantor. *Ib.*
4. ———: ———: **Retaining Possession of Land.** A deed, unconditional in its terms and beyond the control of the grantor after its delivery to a depository with specific directions to deliver it to the grantee upon his death, although not conferring an immediate right of present possession, constitutes such an investiture of title as to give the grantee a present fixed right of future enjoyment, although the use of the land is retained by the grantor during his life. *Ib.*
5. ———: ———: **Acceptance.** Acceptance of a deed after the grantor's death dates back to the time of its delivery to the depository, and renders it a transfer of the title as of that date. *Ib.*
6. ———: **Evidence of Agency.** The cashier having defined his relation to the grantor, showing that it was in no wise different from that sustained by him to other patrons of the bank, it was not error to exclude testimony tending to show that the cashier was the agent of the grantor throughout the transaction by which the grantor delivered to him a deed to be delivered to the grantee upon the grantor's death. *Ib.*
7. ———: **Sale of Trust Property: Consideration Recited in Deed.** A consideration recited in the trustee's deed conveying property to a purchaser is prima-facie evidence of the real consideration, and holds until the contrary is shown. But where the property in 1875 rented for about \$1000 a year, which indicated a value of about \$17,000, evidence that by 1890 the neighborhood had become bad, that the rents had decreased to \$250 a year, and that it was

CONVEYANCES—Continued.

in 1897 traded for other real estate, is some evidence that the recited consideration of \$17,000 was not the real consideration, for it is a well known fact that, in trading real estate, the consideration mentioned in the deed is often not the cash value. *Price v. Boyle*, 257.

8. **Reserving Life Estate: Testamentary.** A deed of gift in the usual form of a general warranty deed in fee contained a clause declaring that the land should "remain the property of the grantor during the term of his natural life." This deed was immediately delivered and recorded. *Held*, that it did not operate a testamentary disposition of the land, but was a present conveyance in fee subject to the life estate only, and took effect immediately upon delivery. A subsequent deed from the same grantor passed his life estate, but nothing more. *McAlister v. Pritchard*, 494.

CONVICT. See **Imprisonment**.

CORPORATIONS.

1. **Ultra Vires: Enforcement of Executed Contract.** It is the settled rule of law in Missouri that the defense of *ultra vires* is not admissible to prevent the enforcement of the contract of a corporation, where the contract has been fully executed on one side, unless it is a contract expressly prohibited by law; and this principle extends to executed contracts for the purchase by a corporation of goods in which the corporation has no authority to deal; and it permits recovery of the price of such goods, purchased and delivered. *Schlitz Brew. Co. v. Poultry & Game Co.*, 400.
2. ———: **Estoppel.** The provision of Section 9749, Revised Statutes 1919, and Section 7, Article 12, of the Constitution of Missouri, that no corporation shall engage in business other than that expressly authorized in its charter, or the law under which it may have been or may hereafter be organized, does not prevent the application of the doctrine of estoppel. *Ib.*
3. **Public Utility: Compulsory Service: Unelected Territory.** The Public Service Commission has no power to make an order compelling an electric light company to furnish electricity to a town which is not a part of the territory it has undertaken to serve. Such compulsory service would be tantamount to an appropriation of the company's property to a public service to which it has not been dedicated, and would amount to the taking of private property for a public use without just compensation. But on the other hand, if the town is territory comprehended within the company's profession of service it may be required to serve it, because it is its duty, within reasonable limitations, to serve all in such territory who apply. *State ex rel. Power Co. v. Public Serv. Comm.*, 522.
4. ———: ———: ———: **Question of Fact.** Whether or not an electrical company has undertaken to supply electricity to a certain territory is a question of fact to be determined by the evidence before the Public Service Commission, and will be determined by the Supreme Court, on review, unhampered by the findings of either the Commission or the circuit court; and where there is no express declaration of the territorial limits of its service, the fact may be determined by its charter and what it has done thereunder. *Ib.*

CORPORATIONS—Continued.

5. **Public Utility: Compulsory Service: Unselected Territory: Charter Provisions.** The charter of a public service company empowering it "to generate, distribute and sell electric energy in Missouri and elsewhere, and to do all things incident thereto" is merely permissive, and does not require it, upon demand, to distribute and sell electricity everywhere in Missouri, nor can it be reasonably inferred that by accepting such charter power it undertook to furnish service in all parts of the State. But where, upon receiving such charter, it proceeded to localize the territory in which it proposed to operate, and applied for and received a franchise permitting it to erect poles for the suspension of electric light and power wires on and along the public roads and highways of Newton County, and obtained pole-line rights-of-way in Jasper, Lawrence, Christian, Greene and Taney counties, applicable to all highways alike it will be held that it obtained franchises that covered all the highways in said counties, including the streets and thoroughfares of the town of Diamond, in Newton County, and that it undertook to serve, in some form, the inhabitants of said town with electricity, upon terms that are reasonable and fair. *State ex rel. Power Co. v. Public Serv. Comm.*, 522.
6. ———: ———: ———: **Precise Service: Shown by Acts.** Where the public service company constructed a water-power plant for generating electricity in Taney County; built a transmission line from it northerly through Newton County to Joplin; erected a sub-station a mile east of Diamond and from thence built additional lines extending to Granby and Neosho in Newton County; put in distribution systems at Granby and at Pierce City in Lawrence County; then began the operation of its plant and the distribution and sale of electric current; at Joplin and Neosho, sold and delivered electricity at wholesale to another electric company; at Granby and Pierce City, distributed and sold the current directly to consumers, it marked out for itself the precise service undertaken within the selected territory, and the inference from these constructions and operations necessarily is that it had undertaken not only to furnish electricity to the public at wholesale, but to distribute and sell it to the inhabitants of the towns and other populous centers in the selected district, including the town of Diamond. And the inference that Diamond was a community it had professed to serve is further enforced by the fact that its agent went there to ascertain how many of its residents would use the service. *Ib.*
7. ———: ———: **Reasonableness.** An electrical company is not required to furnish electricity to every village and hamlet within the boundaries of its professed service, unless such requirement is reasonable; and the reasonableness of an order of the Public Service Commission requiring it to serve a certain town depends on whether it is arbitrary, capricious or unlawful. And where the facts demonstrate that the order is neither arbitrary nor capricious, it can be held to be unlawful only on the ground that it will operate to take the company's property for a public use without just compensation. *Ib.*
8. ———: ———: ———: **Unlawful: Just Compensation.** Where the order of the Public Service Commission requiring an electrical company to distribute and sell electricity to the inhabitants of a certain town does not appropriate such property to a public use to which the company has not already dedicated it, and the evidence shows that furnishing the service will not entail even a

CORPORATIONS—Continued. -

present financial loss, and that the gross revenue will be sufficient to cover depreciation and the cost of operation and to insure an adequate return on the investment, the order cannot be held to operate to take the company's property for a private use without just compensation, but is a reasonable and lawful one. Ib.

9. ———: ———: **Choosing Towns Within Selected Territory.** Where the effect of its occupying a selected territory by a public service corporation is to exclude therefrom other public service utilities and to leave unserved the communities therein it does not choose to serve, it will not be permitted to pick and choose and serve only the portion of the territory covered by its franchise which is presently profitable to it. Ib.

COUNTIES.

1. **Boundary Between New Madrid and Pemiscot: Government Survey.** When the Legislature in 1851 made the junction of Portage Bay with Little River one of the calls in describing the boundary line between Pemiscot and New Madrid counties, it did not have in mind some point fixed by a Government survey, but merely the physical object, the junction of the two streams. Alluvial Realty Co. v. Lbr. Co., 299.
2. ———: **Junction of Streams.** As a physical object, constituting a natural monument, the junction of Portage Bay with Little River, when the Legislature in 1851 fixed upon that junction as one of the calls in describing the boundaries between Pemiscot and New Madrid counties, was at the place where the waters of the bay, under normal conditions, flowed into those of the river and the bay lost its identity as a stream. Ib.
3. ———: ———: **Center of Section Ten.** The Legislature, in 1868, in attempting to define the northern boundary of Pemiscot County fixed upon the "middle of Section Ten" as the western termination of the boundary, and by reversing the course and running due east from it, the location of another call, "the junction of Portage Bay with Little River," as it existed at the time of the passage of the act, is likewise fixed, and the boundary line is the east-and-west line through the middle of Sections Nine and Ten. Ib.
4. ———: **Evidence: Practical Interpretation of Statute.** The "Government Tract Book of New Madrid County," the "New Madrid County Plat Book" certified by the Register of Lands, and testimony relative to the assessments by New Madrid County of the lands in the disputed territory, were all competent evidence upon the issue whether the lands are situate in Pemiscot or New Madrid County. Collectively they tended to show the interpretation put upon the Boundary Act of 1868, defining the boundary between the two counties, by the United States Land Office and by the executive department of the State, and to show that there was a practical location of the boundary, conforming to such interpretation, acquiesced in and treated as correct by the public authorities and the counties themselves for many years. Ib.

COURTS.

Judicial Knowledge: Value of Services. The employment of an auditor of a railroad construction company is not such a common thing,

COURTS—Continued.

and the reasonable value of the services that may be performed by such an official is not so within the common knowledge of all men, that courts and juries may be presumed to know their value without proof. See *lig v. M., K. & T. Ry. Co.*, 343.

CRIMINAL LAW

1. **Prostitution: Receiving Money of Prostitutes: Act of 1913.** Section 3 of the Act of 1913, Laws 1913, page 220 (the Missouri "White Slave" Act) does not distinguish between the character of persons to whom it is intended to apply, but is broad enough to embrace all persons who knowingly accept money earned by a woman by acts of prostitution, without consideration, regardless of the manner in which it is received, whether they be procurers, or men engaged in illicit traffic with women, or a woman who keeps a bawdy house and requires another woman therein to divide with her the proceeds of her earnings while engaged in prostitution. *State v. Howe*, 1.
2. ———: ———: **Earned by Illicit Sexual Intercourse.** An instruction telling the jury that if defendant did knowingly, unlawfully and feloniously accept, receive or appropriate to her own use any amount of unlawful money made by the earnings of a certain woman, "by engaging in prostitution, that is, by having illicit sexual intercourse with men," etc., includes words not in the statute, and by the use of the word "illicit" might require the jury to find that the prostitution of the woman was criminal; but their inclusion is an error of which the defendant cannot complain, because these words placed upon the State a greater burden than the statute does, and requires the jury to find a fact which the statute does not make an element of the offense. The statute only requires the jury to find that the money received by defendant was earnings received by a woman engaged in prostitution; and if the money was so earned, and defendant knowingly received it, without other consideration, she is guilty under the statute, although the conduct of the prostitute may not have been violative of the criminal law. *Ib.*
3. ———: ———: **Evidence: Physician's Receipt.** A physician's receipt showing that defendant had paid a bill for the prosecutrix, offered for the purpose of accounting for the absorption by the defendant of the prosecutrix's money, is a mere statement of a third person not a party to the suit, without opportunity of cross-examination, and is therefore pure hearsay, and is properly excluded. *Ib.*
4. **Defendant as Witness: Cross-Examination: Former Conviction.** Under the statute (Sec. 6383, R. S. 1909), a defendant, who takes the witness stand in his own behalf, may be asked on cross-examination if he was ever convicted of felony or other crime. *Ib.*
5. **Evidence: Running off Witness.** Testimony tending to show that defendant has attempted to procure false evidence, or to destroy evidence against himself, or to spirit away the prosecutrix so as to prevent her from testifying, is always admissible. *Ib.*
6. **Opening Statement.** It is not incompetent for the prosecuting attorney to mention any fact in his opening statement which he can prove and it is competent for him to prove. It was not improper for the prosecuting attorney in his opening statement to state

CRIMINAL LAW—Continued.

that defendant had attempted to spirit away the prosecutrix, since it was proper to prove that fact and there was evidence tending to prove it. *Ib.*

7. **Indictment: Perjury: Materiality of Question.** At common law, a general allegation in an indictment for perjury that the question asked the witness in an investigation before a grand jury was material was insufficient, but it was necessary that it state facts showing its materiality; but under the statute (Sec. 3132, R. S. 1919) such general allegation is sufficient, and it is only necessary to allege that the matter or testimony alleged to be false was material to a certain matter or issue named, without setting forth the particular facts showing its materiality. *State v. Ruddy*, 52.
8. ———: ———: **Explicit Charge: Statute of Jeofails.** Where the question asked of Ruddy by the grand jury was, "Have you been in the home of Jim Benvenuto and Sadie Benvenuto within the last twelve months?" an indictment charging that "whereas, the said grand jurors charge that in truth and in fact the said Mike Ruddy had been frequently in the said house in which the said Jim Benvenuto and Sadie Benvenuto had lived for the past twelve months" and that "the said Mike Ruddy at the time of giving said testimony well knew that on several occasions within the last twelve months he had gone into said house in which said Jim and Sadie Benvenuto were then and there so living," while it does not specifically allege that Ruddy had been in the house of the Benvenettos, but only in the house in which they lived, and does not positively allege that he had been in the house where they lived, but only knew he had been there, is sufficient under and its defects are cured by the Statute of Jeofails (Sec. 3908, R. S. 1919), which declares that no indictment shall be deemed invalid for omissions or irregularities "for want of an allegation of the time or place of any material fact, when the time and place have once been stated," nor "for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant." The indictment does fail to contain an allegation of "the time or place of a material fact," and it has a "defect or imperfection" similar in character to such omission, and these defects are cured by the statute. So also had "the time and place once been stated in the indictment" in the case. *Ib.*
9. **Perjury: Evidence: Materiality.** Where the grand jury was inquiring whether intoxicating liquors had been unlawfully sold at the house of Jim and Sadie Benvenuto, a question asked of Ruddy whether he had been in said house within the last year was material, and a false answer constituted perjury. A case may be built up step by step, and one of the steps in making out the case of unlawful sale of intoxicating liquor at said house was to show that the witness visited the place where the liquor was being sold, and if he denied being there it was useless to ask him if he saw the sale of it. *Ib.*
10. **Evidence: Dying Declaration: Antecedent Statement: Brought Out by Defendant.** A defendant cannot complain of a statement made by deceased just prior to his dying declaration, if it was brought out by the suggestion of his counsel. *State v. Dougherty*, 82.

CRIMINAL LAW—Continued.

11. **Evidence: Dying Declaration: Antecedent Statement: Competency: Res Gestae.** A statement made by deceased immediately preceding his dying declaration, that "it was a shame to shoot a man this way," made at the time of the shooting and necessarily forming a part of the facts and circumstances attending the crime, and so indissolubly connected with the act itself as to form a part of the *res gestae*, is properly admitted in evidence. *State v. Dougherty*, 82.
12. **Instructions: General Objection.** A general objection to instructions in a criminal case will not save them for review on appeal. The instructions complained of should be so designated, either literally, numerically or by reference to their subject-matter, as to enable the trial and appellate courts to determine what instructions are referred to. *Ib.*
13. —: **Converse of Those Given.** If the instruction given states the facts necessary to be found to establish the crime, and cannot reasonably be construed otherwise than as telling the jury that if they find the facts stated they may convict, but unless they so find they will acquit, it is not error to fail to give a converse instruction based on defendant's testimony. The words at the end of the instruction given for the State "unless the jury find the facts to be as stated they will acquit defendant" of themselves constitute a converse instruction, and it is only when such words are omitted from the one given that it is necessary to supplement it by a converse one. *Ib.*
14. **Abortion: Gravamen: Intent.** The production of an abortion is not the offense denounced by the statute (Sec. 4458, R. S. 1909), but the intent to produce a miscarriage or abortion, where the act is not a medical necessity. The intent constitutes the gravamen of the offense, and the evidence must establish such unlawful intent. *State v. Keller*, 124.
15. —: **Intent: Sufficient Evidence: Dying Declaration.** A conviction under the statute declaring that "any person who, with intent to produce or promote a miscarriage or abortion," administer "to a woman (whether actually pregnant or not), any instrument or other method or device to produce miscarriage or abortion," cannot be based upon the dying declaration of the deceased woman alone unless the State also show that she was pregnant when the operation was performed. If there is no evidence to show that the woman was pregnant at the time of the operation, her dying declaration, uncorroborated, is not sufficient (under Sec. 5240, R. S. 1909) to sustain a conviction. *Ib.*
16. **Imprisonment: Parole: Subsequent Conviction: Penalties Cumulative.** The terms of imprisonment of a person who has been convicted of a felony, has been paroled and again convicted of another felony and whose parole, after he has been again committed to the Penitentiary under the second conviction, has been revoked by the Governor, are cumulative and not concurrent; and under the statutes, his term of imprisonment under the second conviction does not begin until he has served out his sentence under the first. *Ex parte Lee*, 231.
17. —: —: —: **Error in Bookkeeping.** And the fact that the books of the Warden of the Penitentiary and the Board of Prison Control show that, upon the reception of the convict under

CRIMINAL LAW—Continued.

his second conviction, he was held and continued to serve under said second commitment and that he was discharged therefrom, under the three-fourths rule for good behavior, does not affect the legality of his imprisonment under the first commitment for the balance of the term remaining after his parole was revoked. That was a mere error of bookkeeping, although the second commitment began before the parole under the first was revoked. *Ib.*

CURTESY.

1. **Deed by Wife Alone.** The estate of the husband both by the curtesy initiate and by the curtesy consummate, is completely wiped out by a conveyance by the wife of her separate real estate during her lifetime, regardless of his failure or refusal to join in her deed. *Brook v. Barker*, 13.
2. ———: ———: **Married Woman's Acts.** The Married Woman's Acts of 1889, declaring (in Sec. 7328, R. S. 1919) that all real estate belonging to any woman at her marriage, or which may have come to her during coverture by gift or inheritance, or by purchase with her separate money or means, shall be and remain "her separate property and under her separate control," and by declaring (in Sec. 7323, R. S. 1919) that "a married woman shall be deemed a *femme sole*" so far as to enable her "to contract and be contracted with," gave to a married woman the unrestricted right to convey her said real estate by her sole deed, without her husband joining therein, and such a conveyance by her alone extinguishes his curtesy in her real estate so conveyed. *Ib.*

DAMAGES.

1. **Grade of Street: Waiver: Estoppel.** Where there was embodied in the deed of dedication of a sub-division a clause to the effect that "all avenues and alleys laid out in said sub-division, and for better identification etched on the above plat, are hereby dedicated to public use forever, and any claims for damages which may arise by reason of changing the present surface of said avenues and alleys to conform to such grades as may hereafter be established by the city, are hereby waived," and said deed of dedication was accepted by the city and duly recorded, and thereafter the grade of one of said avenues was changed to seven feet below the natural surface, after plaintiff's with notice, bought lands abutting thereon from the dedicator, they are estopped to claim damages contrary to said waiver. *Stapenhorst v. St. Louis*, 285.
2. ———: ———: **Consideration: Acceptance.** The acceptance by the city of a deed dedicating streets to public use and containing a waiver of damages for changes in the grade is in itself a sufficient consideration to sustain both the dedication and waiver. *Ib.*
3. ———: ———: **Damages to Abutting Property.** The Constitution of 1875, in declaring that private property cannot be taken or damaged for public use without just compensation, did not prevent a proprietor of a sub-division of land, who wishes to sub-divide it into blocks, streets, lots and alleys, from expressly authorizing the city, in the deed of dedication, 'to grade the streets without paying damages to abutting property. By his deed of dedication, the proprietor may give up his right to compensation, for the uses included in the dedication, both for the taking of the prop-

DAMAGES—Continued.

erty used as the street and for damages to the adjoining property resulting from such use. *Stapenhorst v. St. Louis*, 285.

4. **Grade of Street: Waiver: Running With Title: Easement.** Where the owner of land by his deed of dedication gives and dedicates to the public an easement to use and grade the land embraced in the street without the payment of damages to the dedicator's adjoining land, and such deed is accepted by the city and is acknowledged and recorded, subsequent purchasers from such owner of lots abutting on the street take title subject and servient to such public easement, which becomes an encumbrance upon their lots and runs with the title. The city's right to grade without paying damages, in such case, is an easement, and not a mere revokable license. *Ib.*
5. ———: ———: **Coerced by City: Evidence.** That the board of public improvements refused to approve the plat of the subdivision unless the deed of dedication contained a release of damages for subsequent grading of the streets, can only be shown by its records; for neither the city nor the public is bound to take knowledge of its acts or words unless they are of record. *Ib.*
6. ———: ———: ———: **Power of Board: Abuse of Discretion.** Under the old charter of St. Louis declaring that "the Board of Public Improvements shall have authority to approve maps or plats of sub-divisions which fully dedicate to the public use, streets, alleys and public places," said board had authority to accept a deed of dedication or plat waiving damages for subsequent grading of the streets so dedicated, and having such authority it did not abuse its discretion by refusing to approve such plat or deed unless it contained a waiver of such damages. *Ib.*
7. ———: ———: **Ultra Vires.** The acceptance by the City of St. Louis of a deed of dedication containing a waiver of damages for subsequent change in the grade of streets is not beyond the power of the city, nor of any statute, nor of any provision of the Constitution. And since the statute expressly provides that when property owners lawfully entitled to damages for grading a street "shall not have waived all right or claim thereto" ordinances providing for such grading shall also provide for ascertaining and paying the damages, there is no more proper or timely way of making a waiver of such damages than in the deed of dedication. *Ib.*
8. **Nominal Damages: Definition.** By nominal damages is meant those awarded where, from the nature of the case, some injury has been done the amount of which the proofs fail entirely to show, or, differently expressed, a trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained. *Seelig v. M., K. & T. Ry. Co.*, 343.
9. ———: **Railroad Consolidation: Assumption of Debt.** Where one corporation was merged into another consolidation, the merged company transferring to the other all its property except its franchise to be a corporation and going entirely out of business, and the other assuming to pay all its debts, in an action against the surviving corporation to recover for services rendered in relation to the affairs of the merged corporation, if the only evidence of

DAMAGES—Continued.

the value of the services covers the entire period, and nothing shows separately the value of those rendered before the consolidation, there is no basis for an instruction authorizing recovery; the assumptions of debt did not cover the after-rendered services. *Ib.*

10. ———: **Nominal Damages.** Where there is no evidence from which the value of services for which suit is brought can be estimated, the plaintiff is not entitled to recover more than nominal damages. *Ib.*
11. **Judicial Knowledge: Value of Services.** The employment of an auditor of a railroad construction company is not such a common thing, and the reasonable value of the services that may be performed by such an official is not so within the common knowledge of all men, that courts and juries may be presumed to know their value without proof. *Ib.*

DANGEROUS MACHINERY.

Guards: Negligent Use. The Court of Appeals reversed a judgment for relator against his master for personal injuries sustained while working at a planing machine, which relator's petition alleged was operated without having any safe and secure covering, guard or protection to prevent workmen coming in contact with the rotating knives of said machine and which it was alleged the master carelessly and negligently failed to safely guard. The facts showed that a guard was provided which could be adjusted by a thumb-screw to any required height. For some unexplained reason this guard suddenly and unexpectedly failed to work when relator attempted to lower it and so he tightened the thumb-screw to hold it in place and proceeded to use the machine with it in that position. It was relator's duty to adjust the guard. While using the machine to plane a heavy board with the guard as stated his foot slipped on a loose piece of gas-pipe lying on the floor and covered with shavings and his arm and hand were thrown against the knives and he was injured. *Held*, the decision of the Court of Appeals was not in conflict with any decision of the Supreme Court. *State ex rel. Manker v. Ellison*, 647.

DEDICATION OF STREET.

1. **Damages: Grade of Street: Waiver: Estoppel.** Where there was embodied in the deed of dedication of a sub-division a clause to the effect that "all avenues and alleys laid out in said sub-division, and for better identification etched on the above plat, are hereby dedicated to public use forever, and any claims for damages which may arise by reason of changing the present surface of said avenues and alleys to conform to such grades as may hereafter be established by the city, are hereby waived," and said deed of dedication was accepted by the city and duly recorded, and thereafter the grade of one of said avenues was changed to seven feet below the natural surface, after plaintiffs, with notice, bought lands abutting thereon from the dedicator, they are estopped to claim damages contrary to said waiver. *Stapenhorst v. St. Louis*, 285.
2. ———; ———: ———: **Consideration: Acceptance.** The acceptance by the city of a deed dedicating streets to public use and contain-

DEDICATION OF STREETS—Continued.

ing a waiver of damages for changes in the grade is in itself a sufficient consideration to sustain both the dedication and waiver. *Stapenhorst v. St. Louis*, 285.

3. **Damages: Grade of Street: Waiver: Damages to Abutting Property.** The Constitution of 1875, in declaring that private property cannot be taken or damaged for public use without just compensation, did not prevent a proprietor of a sub-division of land, who wishes to sub-divide it into blocks, streets, lots and alleys, from expressly authorizing the city, in the deed of dedication, to grade the streets without paying damages to abutting property. By his deed of dedication, the proprietor may give up his right to compensation, for the uses included in the dedication, both for the taking of the property used as the street and for damages to the adjoining property resulting from such use. *Ib.*
4. ———: ———: ———: **Running With Title: Easement.** Where the owner of land by his deed of dedication gives and dedicates to the public an easement to use and grade the land embraced in the street without the payment of damages to the dedicator's adjoining land, and such deed is accepted by the city and is acknowledged and recorded, subsequent purchasers from such owner of lots abutting on the street take title subject and servient to such public easement, which becomes an encumbrance upon their lots and runs with the title. The city's right to grade without paying damages, in such case, is an easement, and not a mere revokable license. *Ib.*
5. ———: ———: ———: **Coerced by City: Evidence.** That the board of public improvements refused to approve the plat of the subdivision unless the deed of dedication contained a release of damages for subsequent grading of the streets, can only be shown by its records; for neither the city nor the public is bound to take knowledge of its acts or words unless they are of record. *Ib.*
6. ———: ———: ———: ———: **Power of Board: Abuse of Discretion.** Under the old charter of St. Louis declaring that "the Board of Public Improvements shall have authority to approve maps or plats of sub-divisions which fully dedicate to the public use, streets, alleys and public places," said board had authority to accept a deed of dedication or plat waiving damages for subsequent grading of the streets so dedicated, and having such authority it did not abuse its discretion by refusing to approve such plat or deed unless it contained a waiver of such damages. *Ib.*
7. ———: ———: ———: **Ultra Vires.** The acceptance by the City of St. Louis of a deed of dedication containing a waiver of damages for subsequent change in the grade of streets is not beyond the power of the city, nor of any statute, nor of any provision of the Constitution. And since the statute expressly provides that when property owners lawfully entitled to damages for grading a street "shall not have waived all right or claim thereto" ordinances providing for such grading shall also provide for ascertaining and paying the damages, there is no more proper or timely way of making a waiver of such damages than in the deed of dedication. *Ib.*

See, also, **Highways.**

DEFINITIONS.

1. **F. O. B. Destination.** The term "f. o. b. St. Louis," if used at all in the contract for the sale of railroad ties in this case, was not used in its ordinary commercial sense; but the uniform manner of delivery, inspection, acceptance and payment of the purchase price, the assumption of the trouble and expense, by the agent of the purchaser, of ordering cars, loading the ties and paying the freight, and the fact that the vendors had no further interest or concern in the ties or their transportation after they were placed in the loading station yard, inspected and accepted, rebut the implication that the term "f. o. b. St. Louis" was understood as implying that the freight charges should be at the cost of such vendors, and on that term no judgment that they were, as between them and said purchaser, entitled to the excess of the overcharges made by the railroad company can be based. *Cobb v. Joyce-Watkins Co.*, 39.
2. **Nominal Damages: Definition.** By nominal damages is meant those awarded where, from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show, or, differently expressed, a trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained. *Seelig v. M., K. & T. Ry. Co.*, 343.
3. **Burden of Proof.** The term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning, or at any subsequent stage of the trial, in order to make or meet a prima-facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, sometimes called the "burden of evidence," passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets that obligation upon the whole case he fails. This burden of proof never shifts during the course of the trial. *Downs v. Horton*, 414.
4. ———: **Distinction.** The phrase "burden to prove" used in the Negotiable Instrument Act, means the "burden of evidence," as distinguished from the "burden of proof" in its strict sense. *Ib.*
5. **Contributory Negligence.** Contributory negligence rests on tort, and is the lack of that ordinary care on the part of a plaintiff which directly contributes to cause or causes his injury. *Harbacek v. Iron Works*, 479.
6. **Assumption of Risk.** Assumption of risk is generally limited to the relation of master and servant and rests upon contract either express or implied. It is a separate and distinct defense from contributory negligence, and is differently applied. *Ib.*
7. **Right Heirs: Testator's Definition of Terms.** Inasmuch as it appears from testator's will that in one clause of his will he used the terms, "my right heirs" as descriptive of a class different from the "direct heirs, children or grandchildren" of his adopted son, the court will give the same meaning to said words, "right heirs," whenever used in said will, in the absence of any other definition

DEFINITIONS—Continued.

of them; and therefore plaintiff could not claim title to said realty under said will as a "right heir" of testator. *Bernero v. Bernero*, 602.

DEPOSITIONS.

1. **Absence from State: How Proven.** The facts which will authorize the reading of a deposition may be established by the testimony of deponent or the certificate of the officer taking the same, or if deponent is gone out of the State, by additional proof that his present duty kept him in another State. *Mayne v. K. C. Rys. Co.*, 235.
2. ———: **In Military Service.** The deposition of a citizen of this State who deposed that at the time it was taken he was in the military service of the U. S. Army and stationed in another State, had been for six months and had not been discharged, and knew not when he would be able to return to his home in this State, although its date is not so stated as to determine how long it was taken before it was offered in evidence, is properly admitted in evidence, especially where the attorney for the party offering it testified that he had had correspondence with deponent at the military camp and was willing for opposite counsel to see the correspondence. *Ib.*
3. ———: **Present at Place of Trial.** After a deposition of a witness was admitted in evidence on the ground that he was absent from the State, it was discovered that he was at the place of trial, and he was then sworn for the purpose of allowing the opposite party to cross-examine him, and such offer was declined. *Held*, that there is no reversible error in allowing the deposition to stand, because said opposite party was not harmed by it. *Ib.*

DISBARMENT OF ATTORNEYS. See *Attorneys*.

DIVORCE.

1. **Husband and Wife: Contract Looking to Divorce Void: Non-Severable Clauses.** A married couple entered into a contract whereby the husband agreed to pay the wife \$200 per month during the rest of her life unless she should decide that she wished to remarry, in which case he was to secure a divorce on the grounds of desertion, the monthly payment to start as soon as the wife should leave him and to cease when he should be notified of her desire to remarry. Other clauses provided that he should keep alive a certain \$12,000 policy of life insurance for her benefit, to be discontinued, however, upon her remarriage; that if he died first she should inherit all his property, provided she had not remarried in the meantime; that she should at any time sign any deed or other instrument necessary to enable him to conduct his real estate or other business; that she should in no way interfere with or obstruct him in the conduct of his business; that in case of her remarriage she should transfer to him all her rights in his property and in any property that they might have conjointly; that she would sign no legal paper of any kind without his permission, and would incur no debt to be paid by him; and that the furniture in the flat then occupied by them should be sold and the proceeds divided equally between them. *Held, first*, that this contract in its entirety was void, because it was intended to promote and facilitate a divorce; and, *second*, that the other provisions could

DIVORCE—Continued.

not be validated by eliminating the divorce clause, since the contract was not severable. *Beardsley v. Bass*, 393.

2. **Vacation of Judgment for Maintenance.** A fraudulent decree of divorce entered in a Nevada court did not *ipso facto* vacate, as of its date, a decree for separate maintenance in favor of the wife previously entered in a circuit court of this State. *Wagoner v. Wagoner*, 567.
3. ———: **Fraud.** A citizen of Missouri cannot, without cause, desert his wife, and without her knowledge or consent go to a distant state, in which he was never domiciled, and there procure a divorce in her absence which will *ipso facto* vacate a former judgment in her favor for maintenance in a Missouri court in which was adjudicated the same facts against him. *Ib.*
4. **Jurisdiction.** The person whose matrimonial status is affected by a judgment for divorce must be in the jurisdiction where it exists. A citizen of this State does not take with him the interest of his wife in the marriage status, so as to subject it to the jurisdiction of any foreign court which he may find subservient to his purpose to get rid of her. The change of the domicile of the husband, who deserts his wife and goes to another state for the purpose of obtaining a divorce from her, does not draw after it the domicile of the wife. *Ib.*
5. ———: **Judgment for Maintenance.** A decree of a wife residing in Missouri, against her husband for separate maintenance, fixed her matrimonial status separate from his, and when he wrongfully went into another state for the purpose of avoiding his marital obligations such other state did not become her matrimonial domicile, either actual or constructive; and he could not carry her separate matrimonial status to such other state and there use it to give jurisdiction to a court of that state to set aside a judgment of a Missouri court which had fixed it. *Ib.*
6. ———: ———: **Wife's Domicile Following That of Husband.** Ordinarily the matrimonial domicile of the wife follows that of the husband; but when the matrimonial unity is destroyed by a decree of court founded upon his misconduct, or is wrongfully repudiated by him, her matrimonial domicile remains in the state of her residence, and the court of a foreign state into which he has gone for the sole purpose of obtaining a divorce from her does not so acquire jurisdiction as to destroy her separate matrimonial status fixed by the decree of the Missouri court. In such case, the court of the foreign state does not obtain jurisdiction of the *res*—her separate matrimonial status—and whatever may be the effect on his rights and duties of its decree granting him a divorce, it is void in all things relating to her matrimonial status, and does not affect her rights under a former decree of a Missouri court adjudging her entitled to an allowance for separate maintenance, for such decree established her innocence of wrong in the matrimonial relation and her further right to be his wife wherever she might lawfully be. *Ib.*
7. **Jurisdiction of Foreign Court: Fraud.** The presence of the husband's own matrimonial status in the foreign state to which he had gone for the purpose of obtaining a divorce being jurisdictional, fraud in obtaining a matrimonial status there would go to the very foundation of the jurisdiction of its court to grant

DIVORCE—Continued.

him a decree; and where his acts show that he dismissed his suit for divorce pending in a Missouri court for the purpose of seeking a more kindly jurisdiction in another state, and thereby vacated the order for alimony *pendente lite* so as to leave her without means to follow him, and secured a judicial welcome in the other state by engaging board at two hundred dollars per month at a hotel and hiring out as an ornamental clerk at a store for seventy-five dollars per month, it is manifest that he induced the court in the foreign state by actual fraud to assume jurisdiction of his suit for divorce. *Wagoner v. Wagoner*, 567.

8. **Jurisdiction: Service of Process.** Where the husband and wife had for years occupied a certain property as a home, and after he had brought suit for divorce he fraudulently induced her as a part consideration for an allowance of suit money to leave said residence, a service of process on a maid in said home, in her suit for a separate maintenance allowance, brought after he had dismissed his suit for divorce, the said maid and his mother being the only members of his family, is a valid service, and brought him into court, although he was not in the State at the time. *Id.*

DOWER.

Bequest of Personalty. A bequest of personalty to a widow does not bar her dower in real estate; yet, if the bequest be in lieu of dower, she cannot accept the bequest and also her dower, but is put to her election. *In re Goessling v. Goessling*, 663.

See, also, **Wills**, 10 to 12.

ELECTION OF WIDOW TO RENOUNCE WILL. See **Wills**.

ELECTIONS.

Bonds: To Pay Judgments: Notice: Describing Judgments. The notice advising the voters that the purpose of the special election was to determine whether the city should issue its bonds in a named amount for the purpose of funding that much of the city's judgment indebtedness, was not insufficient because it did not describe the judgments. *State ex rel. City of Jefferson v. Hackmann*, 156.

ELECTRICAL COMPANY. See **Corporations**.

EQUITY.

Appeal: Trial de Novo in Supreme Court. Where a case was treated in the trial court as an equity case with the acquiescence and consent of the plaintiff, he cannot object to its being so treated on appeal, and therefore this court will not be limited to consideration of questions of law, but may try the case *de novo* on the facts. *Stripe v. Meffert*, 366.

ESTOPPEL.

1. **Wills: Widow: Renunciation: Election.** Testator's estate was worth about \$200,000, of which \$160,000 was personal property and \$40,000 was real estate. His homestead was worth about \$14,000. His three children by a former marriage and his widow survived him. By his will he gave his widow the use of his homestead and \$200 per month to be paid to her each month out of his estate during her life or widowhood and also all his household effects.

ESTOPPEL—Continued.

He also left an annuity to his mother and then gave the rest of his estate to his three children equally, and appointed his wife and son executors of his will without bond. The executors presented the will for probate and made formal application for letters testamentary, which were granted and they qualified. They filed an inventory and made settlements of the estate in the probate court. These papers were prepared and signed by the son, but were also signed by the widow, at his direction. He employed attorneys to advise and assist him in the administration, the widow leaving the whole matter to him and taking no part therein. He paid her the monthly allowance provided by the will for eleven months, taking receipts therefor, reciting that the payments were under the will. Neither the son nor the attorneys informed her that she had the right to renounce the will and she was ignorant of the law. Nearly a year after her husband's death she first learned of her right to renounce the will and at once executed and filed her renunciation to take under the will. She and testator's infant daughter, of whom the will appointed her guardian, continued to reside in the homestead where they were living when the cause was tried in the circuit court. After her renunciation was filed the monthly allowance was paid to her for a year and she receipted for these payments as being "on account of her share of the income of said estate." She also received household goods appraised at \$445. In addition to the payments to the widow, no part of the personalty was distributed except the payments to testator's mother and an allowance to the daughter made under order of the probate court. The entire personal estate, less the above mentioned payment, was in the hands of the executors. There was no evidence that either of the children had acted upon or been prejudiced by the fact that the widow had received the monthly payments. *Held*, (1) That the widow had the right to occupy the homestead rent free until her dower was assigned and her occupancy was passive and no more indicative of claim under the will than under the right of quarantine; (2) That she was entitled absolutely without election on her part, to a child's share of the personal estate, in this case one-fourth or approximately \$40,000; (3) That all of her acts having been done in ignorance of her legal rights and she having renounced the will within the time and in the manner required by the statutes, and the other parties interested in the estate not having been prejudiced by what she had done, she was not estopped to renounce the will and was not to be held as having elected to take under it. [GRAVES, ELDER and J. T. BLAIR, JJ., dissenting.] In *re. Goessling v. Goessling*, 663.

2. ———: ———: ———: **Stare Decisis.** The question raised by the appeal in this case has been settled by repeated decisions of the Supreme Court, which have now become a rule of property, the adherence to which is indispensable to the due administration of justice. *Ib.*

EVIDENCE.

1. **Prostitution: Physician's Receipt.** A physician's receipt showing that defendant had paid a bill for the prosecutrix, offered for the purpose of accounting for the absorption by the defendant of the prosecutrix's money, is a mere statement of a third person not a party to the suit, without opportunity of cross-examination, and is therefore pure hearsay, and is properly excluded. *State v. Howe*, 1.

EVIDENCE—Continued.

2. **Defendant as Witness: Cross-Examination: Former Conviction.** Under the statute (Sec. 6383, R. S. 1909), a defendant, who takes the witness stand in his own behalf, may be asked on cross-examination if he was ever convicted of felony or other crime. *State v. Howe*, 1.
3. **Running off Witness.** Testimony tending to show that defendant has attempted to procure false evidence, or to destroy evidence against himself, or to spirit away the prosecutrix so as to prevent her from testifying, is always admissible. *Ib.*
4. **Freight Rates: Overcharges: Bill of Sale: Proof.** Bills of sale executed by the seller of railroad ties, in which is set forth the name of the buyer, the number of ties sold, the price, the date and number of car by which shipped, and nothing more, while not required by law the sales and deliveries being complete without them, and the acceptance in payment of drafts from the purchaser which recite that they are given for the purchase price and in settlement of said bills, in the absence of fraud or imposition, characterize the transaction, and furnish indubitable proof that the sellers were not chargeable with the freight charges, and are not entitled, as between them and the said purchaser, to the excess of overcharges in the freight rates made by the railroad and paid by said purchaser. *Cobb v. Joyce-Watkins Co.*, 39.
5. **Perjury: Materiality.** Where the grand jury was inquiring whether intoxicating liquors had been unlawfully sold at the house of Jim and Sadie Benvenuto, a question asked of Ruddy whether he had been in said house within the last year was material, and a false answer constituted perjury. A case may be built up step by step, and one of the steps in making out the case of unlawful sale of intoxicating liquor at said house was to show that the witness visited the place where the liquor was being sold, and if he denied being there it was useless to ask him if he saw the sale of it. *State v. Ruddy*, 52.
6. **Dying Declaration: Antecedent Statement: Brought Out by Defendant.** A defendant cannot complain of a statement made by deceased just prior to his dying declaration, if it was brought out by the suggestion of his counsel. *State v. Dougherty*, 82.
7. ———: ———: **Competency: Res Gestae.** A statement made by deceased immediately preceding his dying declaration, that "it was a shame to shoot a man this way," made at the time of the shooting and necessarily forming a part of the facts and circumstances attending the crime, and so indissolubly connected with the act itself as to form a part of the *res gestae*, is properly admitted in evidence. *Ib.*
8. **Abortion: Intent: Sufficient Evidence: Dying Declaration.** A conviction under the statute declaring that "any person who, with intent to produce or promote a miscarriage or abortion" administers "to a woman (whether actually pregnant or not), any instrument or other method or device to produce miscarriage or abortion," cannot be based upon the dying declaration of the deceased woman alone unless the State also show that she was pregnant when the operation was performed. If there is no evidence to show that the woman was pregnant at the time of the operation, her dying declaration, uncorroborated, is not sufficient (under Sec. 5240, R. S. 1909) to sustain a conviction. *State v. Keller*, 124.

EVIDENCE—Continued.

9. **Personal Injuries: Members of Family: General Objection: Repetition.** It is settled law in this State, and has been since *Dayharsh v. Railroad*, 103 Mo. l. c. 577, that, in an action for damages for personal injuries negligently inflicted, it is error to admit, over proper and timely objection, evidence of the number of plaintiff's children and who compose his family; and while the Court of Appeals so held, its ruling that a general objection was insufficient to save the point was error, and conflicts with prior decisions of the Supreme Court, in view of the fact that the evidence was incompetent for any purpose, and a general objection to it was timely made, and the general objection held inadequate by the Court of Appeals was made, not to a new question, but to a repetition of the question after the trial court had ruled the evidence admissible. *State ex rel. Brew. Co. v. Ellison*, 139.
10. **General Objection: Exception.** An exception exists to the rule that a general objection that certain evidence is irrelevant, incompetent and immaterial, is too broad and sometimes constitutes no objection at all. It is that if the evidence objected to is not competent for any purpose a specific objection has no office and a general objection is sufficient. *Ib.*
11. ———: **Repetition.** Once an objection has been seasonably made and overruled and exception saved, it is not necessary, in order to save the point, to continue to repeat the objection to the same testimony. On the contrary, persistence in a running fire of the same objection to the same testimony might become indecorous and disrespectful. *Ib.*
12. ———: **Materiality Not Foreseen.** The admission of incompetent testimony cannot be excused on the theory that at the opening of the trial the court cannot know that the testimony objected to may not prove competent in some way at late stages of the proceeding. If this were a true theory, then any evidence wholly incompetent can be admitted without error, since it is open to scarcely any other than a general objection, and no general objection would be good at the beginning of the trial. *Ib.*
13. **Responsive Answer: Shown by Subsequent Testimony.** The answer "ten children" is responsive to the question, "Who compose your family?" and it is not shown to be irresponsible by subsequent testimony showing it to be in part untrue. *Ib.*
14. **Objections: Made by One of Several Defendants.** When one of several defendants makes an objection to the admission of testimony it is unnecessary for the others to repeat it in order to put themselves in position to base an assignment of error upon it on appeal. *Ib.*
15. ———: ———: **Motion for New Trial.** Likewise, one of a group of defendants may, in his motion for a new trial, adopt an objection made by another defendant to a ruling of the trial court in admitting evidence and base an assignment of error thereon. *Ib.*
16. **Attorney: Disbarment.** Where the petition for disbarment rests upon indictable offenses, the only proof which will justify a permanent disbarment, of a fixed term of suspension, is a judgment of guilt from a court which tried the case upon the indict-

EVIDENCE—Continued.

ment and heard the facts offered to sustain it. *Jones v. Sanderson*, 176.

17. **Deposition: Absence from State: How Proven.** The facts which will authorize the reading of a deposition may be established by the testimony of deponent or the certificate of the officer taking the same, or if deponent is gone out of the State, by additional proof that his present duty kept him in another State. *Mayne v. K. C. Rys. Co.*, 235.
18. ———: ———: **In Military Service.** The deposition of a citizen of this State who deposed that at the time it was taken he was in the military service of the U. S. Army and stationed in another state, had been for six months and had not been discharged, and knew not when he would be able to return to his home in this State, although its date is not so stated as to determine how long it was taken before it was offered in evidence, is properly admitted in evidence, especially where the attorney for the party offering it testified that he had had correspondence with deponent at the military camp and was willing for opposite counsel to see the correspondence. *Ib.*
19. ———: ———: **Present at Place of Trial.** After a deposition of a witness was admitted in evidence on the ground that he was absent from the State, it was discovered that he was at the place of trial, and he was then sworn for the purpose of allowing the opposite party to cross-examine him, and such offer was declined. *Held*, that there is no reversible error in allowing the deposition to stand, because said opposite party was not harmed by it. *Ib.*
20. **Statement Called For by Memorandum.** Where a so-called declaration of trust recites that the maker has this day rendered the beneficiary and her daughter "a statement setting forth in full all assets of the estate, including the amount which appears in the probate court," such statement, submitted with the declaration of trust, is of equal value as evidence. *Price v. Boyle*, 257.
21. ———: **Common Experience.** Where the executor of his father's will, which gave to the widow a life estate in all the property, had made four annual settlements which showed he had paid the widow an average of \$1391.10 annually, and at the time of the final settlement, made eighteen months after the fourth settlement, he gave to her a written memorandum which recited he had received from her a receipt for \$4,241.10, to be filed with the final settlement, "yet as a matter of fact I have not paid this amount of money to her, and have obtained her receipt simply for the purpose of closing up the administration in the probate court," and further recited that he had "this day rendered" to her and her daughter "a statement setting forth in full all the assets of the estate, including the above amount which appears in the probate court." reason and common sense must be allowed their common functions, if resort must be had to evidence outside the probate court to impeach the final settlement, and it is contrary to reason that the executor should have paid his mother nothing to live on during said eighteen months, and the "statement" mentioned in the declaration showing that during about six months of the eighteen he had paid her \$762, the presumption must be indulged that he paid her a corresponding amount during the other twelve months, and there being no other evidence that he appropriated

EVIDENCE—Continued.

the \$4,241.10 mentioned in the memorandum, his executrix cannot, after his and his mother's death, and nearly forty years after the final settlement, be charged, in a suit for an accounting brought on the theory that he was a trustee of an express trust, with the whole of said \$4,241.10. *Ib.*

22. **Sale of Trust Property: Consideration Recited in Deed.** A consideration recited in the trustee's deed conveying property to a purchaser is prima-facie evidence of the real consideration, and holds until the contrary is shown. But where the property in 1875 rented for about \$1000 a year, which indicated a value of about \$17,000, evidence that by 1890 the neighborhood had become bad, that the rents had decreased to \$250 a year, and that it was in 1897 traded for other real estate, is some evidence that the recited consideration of \$17,000 was not the real consideration, for it is a well known fact that, in trading real estate, the consideration mentioned in the deed is often not the cash value. *Ib.*
23. **Practical Interpretation of Statute.** The "Government Tract Book of New Madrid County," the "New Madrid County Plat Book" certified by the Register of Lands, and testimony relative to the assessments by New Madrid County of the lands in the disputed territory, were all competent evidence upon the issue whether the lands are situate in Pemiscot or New Madrid County. Collectively they tended to show the interpretation put upon the Boundary Act of 1868, defining the boundary between the two counties, by the United States Land Office and by the executive department of the State, and to show that there was a practical location of the boundary, conforming to such interpretation, acquiesced in and treated as correct by the public authorities and the counties themselves for many years. *Alluvial Realty Co. v. Lbr. Co.*, 299.
24. **Innocent Purchaser.** The relation between the guardian and vendee may be shown by the records through which defendant derails title; and where the decree in partition recites that the guardian and W. E. Shenk are "husband and wife" and says that she has a life estate and her minor child a remainder in the land set off to them, and she as guardian of the minor sells the minor's interest to "William E. Shenk" and Shenk's deed to defendant contains a recital of the relationship of William E. Shenk and his wife (the said guardian), the defendant purchased with notice that the grantee in the guardian's deed was her husband. *Bopst v. Williams*, 317.
25. **Relevancy.** It is not error to exclude evidence which is not relevant to the issues in the case. *Seelig v. M. K. & T. Ry. Co.*, 343.
26. **Colloquy.** Where the matter excluded consisted partly of testimony but mainly of colloquy between counsel, the court and the witness, looking toward an adjournment of the case in order to enable the witness, offered as an expert, to inspect certain books and give an opinion based on such inspection, the matter was not responsive to any question, and it was not error to exclude it. *Ib.*
27. **Judicial Knowledge: Value of Services.** The employment of an auditor of a railroad construction company is not such a common thing, and the reasonable value of the services that may be performed by such an official is not so within the common knowledge of all men, that courts and juries may be presumed to know their value without proof. *Ib.*

EVIDENCE—Continued.

28. **Hypothetical Question: All Material Facts.** A hypothetical question which does not embody substantially all the material facts relating to the subject upon which the opinion of the witness is sought is objectionable and should be excluded. *Seelig v. M., K. & T. Ry. Co.*, 343.
29. **Burden of Proof: Meaning.** The term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning, or at any subsequent stage of the trial, in order to make or meet a prima-facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, sometimes called the "burden of evidence," passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets that obligation upon the whole case he fails. This burden of proof never shifts during the course of the trial. *Downs v. Horton*, 414.
30. ———: ———: **Distinction.** The phrase "burden to prove" used in the Negotiable Instrument Act, means the "burden of evidence," as distinguished from the "burden of proof" in its strict sense. *Ib.*
31. ———: **Order of: Directed Verdict.** In an action on a negotiable instrument, where fraud is charged by the answer, it is incumbent on the defendant to first offer evidence of facts tending to show the fraud and nothing more. This raises a presumption which calls upon the plaintiff to disclose the facts which are peculiarly within his knowledge. The plaintiff then gives evidence of all the facts and circumstances under which he acquired the paper, and the presumption takes flight. If the plaintiff's evidence is such that his good faith and want of notice are the only inferences that a fair-minded person could draw from it, it then devolves upon the defendant to prove specific facts tending to show plaintiff's actual knowledge of the fraud or his bad faith. If defendant offers no such evidence, then clearly he has failed to offer any evidence in support of his affirmative defense that plaintiff had notice of the fraud when he took the paper, and the plaintiff is entitled to a directed verdict. *Ib.*
32. **Negotiable Note: Evidence of Notice of Fraud.** It is the law under this act, and was the law before the act was passed, that knowledge of facts which would excite suspicion or put a reasonable man on inquiry, or even negligence, is not sufficient to charge a purchaser of a note with notice of fraud in its origin. *Ib.*
33. ———: **Evidence of Innocence.** Upon proof of fraud or illegality in the creation of a promissory note, an obligation is imposed on the holder to show that he came fairly into possession of it. Evidence that it was taken for value before maturity will not alone meet the requirement. He must show that he had no knowledge or notice of the fraud. Specifically, he must disclose the facts and circumstances under which he acquired it. *Ib.*
34. ———: **The Jury.** When the indorsee of a negotiable instrument in an action on it against the makers, has shown that he purchased it for value before maturity in good faith, and has disclosed all

EVIDENCE—Continued.

- the facts and circumstances attending the purchase, and they are all consistent with good faith and negative any notice of the fraud, and no damaging or discrediting circumstances of substantial value are shown, and defendant produces no counter-vailing or impeaching evidence, the jury may not, by disbelieving the plaintiff's evidence, make a finding that after all the plaintiff did have actual knowledge of the fraud, and that there were facts known to him which made his act in taking the note bad faith on his part. *Ib.*
35. **Personal Injuries: Negligence: Failure of Proof.** Where the specific act of negligence charged in the petition was that defendant failed to furnish plaintiff with goggles to protect his eyes while chipping iron with a cold chisel, and the proof was that plaintiff was an experienced workman, knew the use of goggles, saw other men about the premises at the same kind of work using goggles, had been told by the foreman, that defendant had in the tool room everything that pertained to the job, had in fact for four months been getting his tools from that room, but had never asked for goggles, *held*, that the proof did not support the charge and the plaintiff was properly non-suited. *Harbacek v. Iron Works*, 479.
 36. ———: **Expert: Striking Spike.** The matter of qualification of experts is largely within the discretion of the trial court, and it does not abuse its discretion in permitting a section-man, who has had eighteen months' experience as a trackman, to testify that the proper way to drive a spike is for the driver to be on the same side of the rail as the spike. Furthermore, where the witness corroborated the testimony of the two other conceded experts, his testimony at worst was harmless error. *Adams v. Ry. Co.*, 535.
 37. **Accident Insurance: Prima-Facie Case.** In an action on an accident policy the plaintiff makes out a prima-facie case by introducing the policy and proving the death of the insured, from external bodily injuries accidentally received, within the time covered by the policy. *Lafferty v. Casualty Co.*, 555.
 38. ———: **Testimony of Agent.** The testimony of the agent of the company at the time the policy was issued, tending to show that it was not really delivered to the insured and was not paid for, is competent, although the insured is dead. [Following *Wagner v. Binder*, 187 S. W. 1128, and *Allen v. Jessup*, 192 S. W. 720.] *Ib.*
 39. ———: **Payment of Premium by Volunteer: Hearsay.** Testimony of persons in whose employ the insured was or with whom he was connected in business, showing that at the time they paid the premium on the policy they knew or had been informed that the insured had been killed in a distant town, is not hearsay, but is binding on the plaintiff for the reason that their act in paying the premium, though made of their own motion and voluntarily, was her act, where she seeks to avail herself of the benefit of said act. *Ib.*

FRANCHISE OF PUBLIC UTILITY. See *Corporations*.

FRAUD.

1. **Judgment: Collateral Attack: Raised by Reply.** Plaintiff, a minor, sued in this State, by his curator, for damages for personal injuries

FRAUD—Continued.

received in Kansas. The defendant pleaded that the father of plaintiff had been appointed his guardian by the probate court of the county in which the accident occurred, that said guardian had instituted suit in the district court of said county, that counsel for both parties appeared and it was agreed that judgment should be rendered for plaintiff in a certain amount, that judgment in said amount was rendered, and that the amount had been paid to the clerk of said court for use of said guardian. In his reply, plaintiff alleged that the order of the probate court appointing plaintiff's guardian and the judgment of the district court were procured by fraud, deception and misrepresentation practiced upon those courts by defendant and were void, and that certain attorneys, mentioned in said judgment as counsel for the plaintiff, did not represent him in said courts. *Held*, that the courts of Kansas having jurisdiction of the parties and of the subject-matter of the cause of action, with full power to hear and determine it, and having heard and determined it by said judgment, and the amount having been paid to the clerk for the use of plaintiff's guardian, plaintiff cannot now successfully attack said judgment collaterally by allegations in his reply in the Missouri action to the effect that said judgment was procured by fraud and deception practiced by defendant upon the courts in the act of procuring said judgment; but said judgment is a bar to his said action. *Abernathy v. Mo. Pac. Ry. Co.*, 30.

2. **Negotiable Instruments: Evidence.** Evidence which raises a doubt as to a note not being a safe investment because of the risk taken as to the solvency of the makers, must not be taken as equivalent to showing knowledge of fraud in the procurement of the note. *Downs v. Horton*, 414.
3. ———: **Indorsement Without Recourse.** The fact that the indorser of a note originally tainted with fraud took it indorsed without recourse, is not a badge of guilty knowledge of the fraud on the part of the indorsee. To hold otherwise would be to impair the negotiability of commercial paper. *Ib.*
4. ———: **Proof of: The Jury.** Notwithstanding the jury are the judges of the credibility of testimony, yet, where in an action by an indorsee of a promissory note against the makers it is admitted that the note was originally tainted with fraud on the part of the payee from whom the indorsee obtained it, the latter may show by oral evidence that he had no notice of the fraud when he took the note, and the jury is not at liberty to disbelieve this evidence if it is uncontradicted, unimpeached and free from impeaching circumstances; and it is not at liberty to find that the indorsee had actual knowledge of the infirmity, or of facts which made his taking of the note an act of bad faith within the meaning of Section 10026, Revised Statutes 1909, merely because there is a lack of what the jury deems credible evidence in support of the claim of the indorsee. *Ib.*
5. ———: **What is Proof of Notice.** Under the Negotiable Instrument Act (R. S. 1909, sec. 10026) the duty is devolved upon the holder of a promissory note originating in fraud to prove his good faith and lack of notice of the fraud when he took the note; but in order to constitute notice there must be a finding that he had actual notice of the fraud, or of facts which made his taking of the

FRAUD—Continued.

- note an act of bad faith. It is not enough that the facts in evidence raise a suspicion of guilty knowledge, or that the facts known to him would have put an ordinarily prudent man on inquiry. *Ib.*
6. ———: **Consideration.** The statute does not make want or failure of consideration unmixed with fraud one of the things proof of which will cast on the holder the burden of proving himself a holder in due course. *Ib.*
 7. ———: **Evidence of Notice of.** It is the law under this act, and was the law before the act was passed, that knowledge of facts which would excite suspicion, or put a reasonable man on inquiry, or even negligence, is not sufficient to charge a purchaser of a note with notice of fraud in its origin. *Ib.*
 8. ———: **Evidence of Innocence** Upon proof of fraud or illegality in the creation of a promissory note, an obligation is imposed on the holder to show that he came fairly into possession of it. Evidence that it was taken for value before maturity will not alone meet the requirement. He must show that he had no knowledge or notice of the fraud. Specifically, he must disclose the facts and circumstances under which he acquired it. *Ib.*
 9. ———: **Evidence: The Jury.** When the indorsee of a negotiable instrument in an action on it against the makers, has shown that he purchased it for value before maturity in good faith, and has disclosed all the facts and circumstances attending the purchase, and they are all consistent with good faith and negative any notice of the fraud, and no damaging or discrediting circumstances of substantial value are shown, and defendant produces no counter-vailing or impeaching evidence, the jury may not, by disbelieving the plaintiff's evidence, make a finding that after all the plaintiff did have actual knowledge of the fraud, and that there were facts known to him which made his act in taking the note bad faith on his part. *Ib.*
 10. **Fraudulent Judgment.** Relief from a judgment obtained by fraud may be had in equity, and a judgment so obtained constitutes a defense in law, and no judgment so obtained can be made the basis of a recovery. *Wagoner v. Wagoner*, 567.
 11. **Divorce: Vacation of Judgment for Maintenance.** A fraudulent decree of divorce entered in a Nevada court did not *ipso facto* vacate, as of its date, a decree for separate maintenance in favor of the wife previously entered in a circuit court of this State. *Ib.*
 12. ———: ———: **Desertion of Wife.** A citizen of Missouri cannot, without cause, desert his wife, and without her knowledge or consent go to a distant state, in which he was never domiciled, and there procure a divorce in her absence which will *ipso facto* vacate a former judgment in her favor for maintenance in a Missouri court in which was adjudicated the same facts against him. *Ib.*
 13. ———: **Jurisdiction of Foreign Court.** The presence of the husband's own matrimonial status in the foreign state to which he had gone for the purpose of obtaining a divorce being jurisdictional, fraud in obtaining a matrimonial status there would go to the very foundation of the jurisdiction of its court to grant him a decree; and where his acts show that he dismissed his suit for

FRAUD—Continued.

divorce pending in a Missouri court for the purpose of seeking a more kindly jurisdiction in another state, and thereby vacated the order for alimony *pendente lite* so as to leave her without means to follow him, and secured a judicial welcome in the other state by engaging board at two hundred dollars per month at a hotel and hiring out as an ornamental clerk at a store for seventy-five dollars per month, it is manifest that he induced the court in the foreign state by actual fraud to assume jurisdiction of his suit for divorce. *Wagoner v. Wagoner*, 567.

FREIGHT RATES AND OVERCHARGES. See *Railroads*.

GUARDIAN AND CURATOR.

1. **Jurisdiction: Appointment of Guardian: Collateral Attack.** An allegation that plaintiff minor and his mother were not residents of a certain county in Oklahoma, but of an adjoining county, and that therefore the county court of the particular county had no jurisdiction to appoint a guardian for him, is a collateral attack, and cannot succeed, when made in a suit in this State to annul the guardian's sale of the minor's lands. *Bopst v. Williams*, 317.
2. **Married Woman: Competent to Sell Real Estate.** A married woman, competent under the laws of the foreign state of her residence to be guardian of a minor child residing there, may be permitted by the probate court of this State to sell the minor's lands. The statute (Sec. 411, R. S. 1919) does not require the foreign guardian to possess the qualifications required of a resident guardian, but only requires that the non-resident minor shall have "a guardian in the state or territory in which he resides." *Ib.*
3. **Guardian's Bond: Signed by Attorney: Civil Action.** The statute of Oklahoma prohibiting licensed attorneys from signing bonds as surety "in any civil or criminal action" has no application to a guardian's bond filed in the probate court of this State. It was not given in a "civil action." *Ib.*
4. **Sale of Non-Resident Minor's Real Estate: For Reinvestment.** Section 411, Revised Statutes 1919 (Sec. 49, R. S. 1855), says that "when a non-resident minor, owning real estate in this State has a guardian in the state or territory in which he resides, the probate court in the proper county may authorize his guardian to sell such real estate and receive the proceeds thereof;" and that the preceding sections do not confine the sale to the sole purpose of supporting and educating the minor, nor is the power to sell limited to a sale for any stated purpose; nor is a sale by the foreign guardian invalid because the petition and the order say a sale and reinvestment in the State of the guardian's and minor's residence would be to the best interest of the minor, for those things are not required by the statute to be stated in either. *Ib.*
5. —: **Contingent Remainder.** A contingent remainder in lands is a vendible interest by a person *sui juris* or under execution despite the fact that the person or persons who will ultimately take cannot be determined until the death of the life tenant; and if the apparent remainderman is a minor, his contingent interest can be sold by his guardian when properly authorized by the probate court. *Ib.*

GUARDIAN AND CURATOR—Continued.

6. ———: **Payment of Purchase Price: Dissipation.** The failure of the guardian to account in the proper court for the purchase price of the minor's land, or the dissipation or embezzlement of it by the guardian, does not concern the grantee if the sale was otherwise good; and a recital in the probate record, repeated in the deed, of the receipt of the purchase price in cash cannot be disproved to defeat the title of an innocent purchaser, without notice and for value, from the purchaser at the sale. *Ib.*
7. ———: **Appraisal of Contingent Remainder.** Where the life tenant's interest was computed at a sum substantially less than its value when computed by the statutory table, and the minor's contingent interest was appraised at a sum in excess of the value of an indefeasible and vested remainder, the appraisal furnishes no basis for an attack upon the sale by the guardian of the minor's contingent interest. *Ib.*
8. ———: **Sale to Guardian.** Under the statute, and in the absence of a statute, a purchase by the guardian of the minor's real estate, directly or indirectly, even though approved by the probate court, and even though the sale is at a fair price, is ground, in itself, upon which the interested party may avoid the sale; and whether the deed be held void on its face or only voidable, is immaterial in a suit in equity in which all the facts showing plaintiff's right to avoid the sale are set up in the petition. *Ib.*
9. ———: **Sale to Guardian's Husband.** A sale of the minor's land by the guardian to her husband is voidable in a suit by the minor to set it aside, under the statute and at common law, even though it was at the appraised value and confirmed by the court. And although she had a life estate which would preclude dower vesting in her, yet whatever interest her husband took by her guardian's deed she would have been entitled to share by election under our statutes had she survived him; and on the ground of prospective interest, and on the additional ground which arises out of the nature of the marriage relation, she should be considered a purchaser "indirectly." *Ib.*
10. ———: ———: **Innocent Purchaser.** The relation between the guardian and vendee may be shown by the records though which defendant derails title; and where the decree in partition recites that the guardian and W. E. Shenk are "husband and wife" and says that she has a life estate and her minor child a remainder in the land set off to them, and she as guardian of the minor sells the minor's interest to "William E. Shenk" and Shenk's deed to defendant contains a recital of the relationship of William E. Shenk and his wife (the said guardian), the defendant purchased with notice that the grantee in the guardian's deed was her husband. *Ib.*
11. ———: **Allowance for Improvements.** Where the trial court held that the guardian's deed conveying the land should be set aside, and the plaintiff did not file a motion for a new trial nor appeal, he cannot be heard to complain in the appellate court of the amount allowed to defendant for improvements. *Ib.*

HIGHWAYS.

1. ———: **City: Injury to Pedestrian.** Unless the ground upon which a pedestrian was walking at the time she fell down a series of

HIGHWAYS—Continued.

steps was a public highway, she cannot recover damages from the city. *Cochran v. Wilson*, 210.

2. **City: Injury to Pedestrian: Steps on School Ground.** The space between a school building and a theatre was paved with granitoid and used as a thoroughfare by pedestrian passing from the street in front of the buildings to the next parallel street. The space was school ground, and in it was a series of four or five granitoid steps leading down to an entrance to the theatre. The grounds were unlighted, and plaintiff, walking along the paved passageway at night, fell down the steps and was injured. *Held*, that the liability of the city is dependent upon whether the space can be classed as a public highway, and it could become a public highway only by condemnation, formal dedication or adverse user, *Ib.*
3. ———: **School Grounds: Condemnation.** The land on which the steps were located where plaintiff fell and was injured being the property of the Board of Education, it could not be condemned as a highway, having already been devoted to a public use. *Ib.*
4. ———: ———: ———: **Adverse User.** The statute providing that statutes of limitation shall not extend to lands given, granted, sequestered or appropriated to any public, pious or charitable use, nor to any lands belonging to the State, a strip of land belonging to the Board of Education and used as a necessary appurtenance to one of its school buildings cannot become a public highway by adverse user. Besides, even if by adverse user it could become a public highway, there was no showing of such continuous use for a term of years as caused it to ripen into a prescriptive right to use the passageway as a highway. *Ib.*

HOMESTEAD.

Purchase of Lands: Oral Contract: Wife's Consent. Where the land the vendor orally agreed to sell was his homestead, enforcement will not be denied on the ground that he could not sell it without the concurrence of his wife, where he sold it with the intention of abandoning it, acquired another homestead which he still occupies, accepted payments on the purchase price years after the sale, and permitted the vendee to remain in possession exercising acts of ownership, for fifteen years. *Scheerer v. Scheerer*, 92.

IDEM SONANS.

Process. A defendant named Hornbeck was served with a summons under the name of Hornback. *Held*, that the service and a judgment founded on it were valid, the two names being *idem sonans*. *Little v. Browning*, 278.

IMPRISONMENT.

1. **Parole: Subsequent Conviction: Penalties Cumulative.** The terms of imprisonment of a person who has been convicted of a felony, has been paroled and again convicted of another felony and whose parole, after he has been again committed to the Penitentiary under the second conviction, has been revoked by the Governor, are cumulative and not concurrent; and under the statutes his term of imprisonment under the second conviction does not begin until he has served out his sentence under the first. *Ex parte Lee*, 231.

IMPRISONMENT—Continued.

2. ———: ———: **Error in Bookkeeping.** And the fact that the books of the Warden of the Penitentiary and the Board of Prison Control show that, upon the reception of the convict under his second conviction, he was held and continued to serve under said second commitment and that he was discharged therefrom under the three-fourths rule for good behavior, does not affect the legality of his imprisonment under the first commitment for the balance of the term remaining after his parole was revoked. That was a mere error of bookkeeping, although the second commitment began before the parole under the first was revoked. *Ib.*

INDICTMENT AND INFORMATION.

1. **Perjury: Materiality of Question.** At common law, a general allegation in an indictment for perjury that the question asked the witness in an investigation before a grand jury was material was insufficient, but it was necessary that it state facts showing its materiality; but under the statute (Sec. 3132, R. S. 1919) such general allegation is sufficient, and it is only necessary to allege that the matter or testimony alleged to be false was material to a certain matter or issue named, without setting forth the particular facts showing its materiality. *State v. Ruddy*, 52.
2. ———: **Explicit Charge: Statute of Jeofails.** Where the question asked of Ruddy by the grand jury was, "Have you been in the home of Jim Benvenuto and Sadie Benvenuto within the last twelve months?" an indictment charging that "whereas, the said grand jurors charge that in truth and in fact the said Mike Ruddy had been frequently in the said house in which the said Jim Benvenuto and Sadie Benvenuto had lived for the past twelve months" and that "the said Mike Ruddy at the time of giving said testimony well knew that on several occasions within the last twelve months he had gone into the said house in which said Jim and Sadie Benvenuto were then and there so living," while it does not specifically allege that Ruddy had been in the house of the Benvenettos, but only in the house in which they lived, and does not positively allege that he had been in the house where they lived, but only knew he had been there, is sufficient under and its defects are cured by the Statute of Jeofails (Sec. 3908, R. S. 1919), which declares that no indictment shall be deemed invalid for omission or irregularities "for want of an allegation of the time or place of any material fact, when the time and place have once been stated," nor "for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant." The indictment does fail to contain an allegation of "the time or place of a material fact," and it has a "defect or imperfection" similar in character to such omission, and these defects are cured by the statute. So also had "the time and place once been stated in the indictment" in this case. *Ib.*

INFANTS.

1. **Infancy: No Guardian: Judgment.** Service of summons upon an infant defendant gives the court jurisdiction to proceed, and if it does proceed to judgment without appointing a guardian *ad litem* and there is no general guardian, the judgment, while erroneous, will not be subject to collateral attack. *Little v. Browning*, 278.
2. **Judgment: Appearance of Attorney: Infant.** In a suit against several defendants, one of them, an infant, was not served with

INFANTS—Continued.

process, but an attorney appeared and obtained leave of the court to file answer for all the defendants within ninety days. After the lapse of this time an entry of record was made setting forth the names of all the parties, reciting that the defendants had appeared at the last term of court and taken leave to file answer, but had said nothing further in bar of plaintiffs' action, and thereupon judgment followed. *Held*, that as to the infant defendant the judgment was void, *first*, because the leave to answer had been granted *ex mero motu* and constituted no evidence of an appearance by an unserved defendant; *second*, because of the infancy of this defendant. *Little v. Browning*, 278.

INSTRUCTIONS.

1. **Prostitution: Receiving Money of Prostitutes: Earned by Illicit Sexual Intercourse.** An instruction telling the jury that if defendant did knowingly, unlawfully and feloniously accept, receive or appropriate to her own use any amount of unlawful money made by the earnings of a certain woman, "by engaging in prostitution, that is, by having illicit sexual intercourse with men," etc., includes words not in the statute, and by the use of the word "illicit" might require the jury to find that the prostitution of the woman was criminal; but their inclusion is an error of which the defendant cannot complain, because these words placed upon the State a greater burden than the statute does, and requires the jury to find a fact which the statute does not make an element of the offense. The statute only requires the jury to find that the money received by defendant was earnings received by a woman engaged in prostitution; and if the money was so earned, and defendant knowingly received it, without other consideration, she is guilty under the statute, although the conduct of the prostitute may not have been violative of the criminal law. *State v. Howe*, 1.
2. **Credibility of Witness: Statements Contradictory of Testimony: Comment.** It is not error to refuse an instruction telling the jury that if they find and believe that plaintiff has made statements out of court "contrary to and at variance with his testimony" they "may take this fact into consideration in determining what weight and credibility" they will give to the plaintiff's testimony. Such an instruction is a comment on plaintiff's evidence, and should not be given. The general instruction respecting the credibility of witnesses is sufficient. *Jones v. Frisco Ry. Co.*, 64.
3. **Affidavit for Continuance.** Where defendant filed its application for a continuance, based on the absence of a witness, and set up therein the facts such witness would testify if he were present, which were substantial and material to the issues, and plaintiff agreed that if such witness were present he would testify to those facts, the defendant is entitled to an instruction telling the jury that the evidence of such absent witness, as contained in said affidavit and read to them, is entitled to and should be given the same weight and credit they would give it if said witness were personally present and testified to the same facts. *Ib.*
4. **Measure of Damages: Misleading.** If defendant is fearful that a given instruction on the measure of damages, of itself unobjectionable, may in some way mislead the jury, it is defendant's duty to ask for an instruction declaratory of the law from its viewpoint. *Ib.*

INSTRUCTIONS—Continued.

5. **General Objection.** A general objection to instructions in a criminal case will not save them for review on appeal. The instructions complained of should be so designated, either literally, numerically or by reference to their subject-matter, as to enable the trial and appellate courts to determine what instructions are referred to. *State v. Dougherty*, 82.
6. **Converse of Those Given.** If the instruction given states the facts necessary to be found to establish the crime, and cannot reasonably be construed otherwise than as telling the jury that if they find the facts stated they may convict, but unless they so find they will acquit, it is not error to fail to give a converse instruction based on defendant's testimony. The words at the end of the instruction given for the State "unless the jury find the facts to be as stated they will acquit defendant" of themselves constitute a converse instruction, and it is only when such words are omitted from the one given that it is necessary to supplement it by a converse one. *Ib.*
7. **Covering Whole Case.** It will not be ruled that the Court of Appeals violated previous rulings of the Supreme Court in holding that the instruction given for plaintiff which undertook to cover the whole case contained every necessary element entitling plaintiff to recover against relator, including a requirement for a finding of the existence of such a relation between a firm and the truck driver who negligently caused the injury, on the one hand, and relator on the other, as to render relator liable for the driver's negligence, where an examination of the instruction itself shows that it did in express words include such requirement and all other necessary elements. *Ex parte Brew. Co. v. Ellison*, 139.
8. ———: Declarations of law based upon false assumptions of fact do not correctly declare the law, and should be refused. *Meredith v. Meredith*, 250.
9. **Duplications.** If instructions offered by opposing parties are counterparts of each other, it is not necessary to give both. If one be given it will sufficiently present the opposing theories of the case. *Seelig v. M., K. & T. Ry. Co.*, 343.
10. **Railroad Consolidation: Assumption of Debt.** Where one corporation was merged into another by consolidation, the merged company transferring to the other all its property except its franchise to be a corporation and going entirely out of business, and the other assuming to pay all its debts, in an action against the surviving corporation to recover for services rendered in relation to the affairs of the merged corporation, if the only evidence of the value of the services covers the entire period, and nothing shows separately the value of those rendered before the consolidation, there is no basis for an instruction authorizing recovery; the assumptions of debt did not cover the after-rendered services. *Ib.*
11. ———: **Nominal Damages.** Where there is no evidence from which the value of services for which suit is brought can be estimated, the plaintiff is not entitled to recover more than nominal damages. *Ib.*
12. **Ordinances Regulating Management of Street Cars.** Where, in an action against a street car company to recover damages for

INSTRUCTIONS—Continued.

personal injuries alleged to have been suffered through the negligence of the company's servants, it appears that there are controlling city ordinances regulating the management of the company's cars and imposing requirements looking to the safety of persons and property, instructions given which ignore these requirements are erroneous; and if such are given on behalf of the defendant, which authorize a verdict for defendant without requiring observance of these requirements, the fact that other instructions are given on the part of the plaintiff authorizing recovery by him if the requirements were violated does not cure the error. *Hale v. St. Joseph Ry. Co.*, 499.

13. **Timely Warning: Awaiting Apparent Peril.** Under the vigilant watch ordinance in evidence the motorman cannot delay the sounding of his gong in quick succession until persons, teams or vehicles are actually going upon the track in front of his approaching street car or are in an actual position of danger; he must take affirmative action to give them timely warning of his approach. *Ib.*
14. **Supported by Evidence: Proximate Cause.** The circumstantial evidence showed a small moon-shaped nick in the rail, and three or four nicks in the iron maul, after the injury; that plaintiff heard a ringing sound, as if the maul had struck the rail, when the fellow-servant struck at the spike; that the spike was against the rail when it was struck; that concurrently with the blow some substance, hard and sharp, cut a gash in plaintiff's eye, so that the fluid therefrom immediately escaped into the plaintiff's hand. *Held*, that there was evidence that a piece of steel broke off of the spike, the rail or the maul, as charged in the petition, and such evidence was sufficient to support an instruction submitting that issue to the jury. *Adams v. Ry. Co.*, 535.
15. **Negligence: Driving Spike.** And evidence that the proper way to drive a spike was for the "nipper" to put an iron bar under the tie and pry the tie up tight against the rail before any attempt to drive the spike was made, and for the driver and spike to be on the same side of the rail, and that he stood on the opposite side and struck the spike with the iron maul before the "nipper" had attempted to pry up the tie, is abundant evidence of the driver's negligence in driving the spike. *Ib.*
16. **——: Established Method.** Where the instructions simply says that plaintiff did not assume the risk of any dangerous method of work employed by the driver of spikes in using his maul, unless plaintiff knew or could have known thereof by due care prior to his injury, a criticism that there is no evidence that defendants were negligent in establishing the method of doing the work lacks substance. *Ib.*
17. **——: Extraordinary Vigilance.** An instruction telling the jury that it was not the duty of the plaintiff "to maintain extraordinary vigilance to discover defects and dangers in the method of doing the work," where the work referred to is the work which defendants did through their servant at the time of plaintiff's injury, and not their method of doing such work generally, is not erroneous. Under no circumstances was plaintiff required to exercise more than ordinary care to anticipate said servant's negligent act in doing the work. *Ib.*

INSURANCE.

1. **Life Insurance: Misrepresentations as Defense: Tender of Premiums.** Section 6401, Revised Statutes 1919, found in the article relating to fraternal beneficiary associations and declaring that "such societies shall be governed by this article and shall be exempt from all provisions of the insurance laws of this State, not only in governmental relations with the State, but for every other purpose," exempts such associations from the requirements of Section 6940, found in the general insurance law and declaring that in suits brought upon life policies "no defense based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court for the benefit of the plaintiff the premiums received on such policies." The beneficiary association, when sued by a certificate holder for physical disabilities, can interpose the defense of misrepresentations on his part in obtaining the policy, without having returned or tendered the premiums received. *State ex rel. American Yeomen v. Reynolds*, 169.
2. ———: ———: ———: **Contrary Ruling by Court of Appeals: Exception to General Statute.** The Supreme Court had ruled in *State ex rel. Garesche v. Roach*, 258 Mo. l. c. 552, that the general provisions of a statute must yield to special provisions where there is a conflict and where the general provisions of one part of the statute are inconsistent with the more specific provisions of another part; the Court of Appeals, therefore, contravened said previous decision in holding in *Wilson v. Brotherhood of American Yeomen*, 223 S. W. 992, that Section 6940, Revised Statutes 1919, found in the general insurance law, prevents a fraternal beneficiary association, when sued by a certificate holder, from interposing, as a defense, misrepresentations by the holder in obtaining the certificate, unless it has returned or tendered the premiums paid, since Section 6401 relates specifically to such societies and exempts them, for every purpose, from the operation of said general law. The Court of Appeals, in so ruling, further contravened the previous decision of the Supreme Court in *Hanford v. Mass. Ben. Assn.*, 122 Mo. 50, wherein, in discussing the applicability of the general insurance law in reference to misrepresentations interposed as defenses to actions upon policies issued by assessment companies, it was ruled that corporations doing business under the assessment statute are not subject to any other provisions of the general insurance law except as therein distinctly set forth. *Ib.*
3. **Accident: Prima-Facie Case.** In an action on an accident policy the plaintiff makes out a prima-facie case by introducing the policy and proving the death of the insured, from external bodily injuries accidentally received, within the time covered by the policy. *Lafferty v. Casualty Co.*, 555.
4. ———: ———: **Delivery: Presumption: Directed Verdict: New Trial.** The possession of the policy by the insured raises the presumption that it had been delivered and paid for, or that credit had been given for the premium; and plaintiff having made out a prima-facie case by introducing the policy in evidence and proving the insured's death, by external bodily injuries accidentally received, within the time covered by the policy, it is error to direct a verdict for defendant, however strong and convincing may be the evidence introduced by defendant to show that the policy had not been delivered or the premium paid before the death of the in-

INSURANCE—Continued.

sured. The fact of non-delivery, where the policy was in the possession of the insured, is an affirmative defense, and the weight of the evidence to sustain it is a matter for the jury, which the court cannot lawfully usurp.

Held, by GRAVES, J., concurring, that the presumption of a delivery arises upon the showing that the policy was in possession of the deceased, and such is a rebuttable presumption, but the credibility of facts sufficient in the mind of the court to destroy the presumption is for the jury to determine, and hence where the court, in the presence of such facts, has directed a verdict for the defendant, a motion for a new trial should be sustained. But the trial court has authority to grant a new trial on the ground that the verdict is against the weight of the evidence, and where there is no directed verdict and the jury, in the face of facts which destroy plaintiff's prima-facie case, return a verdict for plaintiff, the court should set it aside. *Lafferty v. Casualty Co.*, 555.

5. ———: **Testimony of Agent.** The testimony of the agent of the company at the time the policy was issued, tending to show that it was not really delivered to the insured and was not paid for, is competent, although the insured is dead. [Following *Wagner v. Binder*, 187 S. W. 1128, and *Allen v. Jessup*, 192 S. W. 720.] *Ib.*
6. ———: **Payment of Premium by Volunteer: Hearsay.** Testimony of persons in whose employ the insured was or with whom he was connected in business, showing that at the time they paid the premium on the policy they knew or had been informed that the insured had been killed in a distant town, is not hearsay, but is binding on the plaintiff for the reason that their act in paying the premium, though made of their own motion and voluntarily, was her act, where she seeks to avail herself of the benefit of said act. *Ib.*

JEOFAILS. See **Indictment and Information.**

JUDGMENTS.

1. **Collateral Attack.** A judgment rendered by a court of another state possessing jurisdiction of the subject-matter and of the parties, cannot be collaterally attacked in the courts of this State. *Abernathy v. Mo. Pac. Ry. Co.*, 30.
2. ———: **Fraud: Raised by Reply.** Plaintiff, a minor, sued in this State, by his curator, for damages for personal injuries received in Kansas. The defendant pleaded that the father of plaintiff had been appointed his guardian by the probate court of the county in which the accident occurred, that said guardian had instituted suit in the district court of said county, that counsel for both parties appeared and it was agreed that judgment should be rendered for plaintiff in a certain amount, that judgment in said amount was rendered, and that the amount had been paid to the clerk of said court for use of said guardian. In his reply, plaintiff alleged that the order of the probate court appointing plaintiff's guardian and the judgment of the district court were procured by fraud, deception and misrepresentation practiced upon those courts by defendant and were void, and that certain attorneys, mentioned in said judgment as counsel for the plaintiff, did not represent him in said courts. *Held*, that the courts of Kansas having jurisdiction of the parties and of the subject-matter of the cause of action, with full power to hear and determine it, and having heard and determined it by said judgment, and the

JUDGMENTS—Continued.

amount having been paid to the clerk for the use of plaintiff's guardian, plaintiff cannot now successfully attack said judgment collaterally by allegations in his reply in the Missouri action to the effect that said judgment was procured by fraud and deception practiced by defendant upon the courts in the act of procuring said judgment; but said judgment is a bar to his said action. *Ib.*

3. ———: **Errors Apparent on Face.** A judgment void on its face binds no one, but may be attacked collaterally in any court in which it is invoked. But a judgment rendered by a court of competent jurisdiction cannot be set aside in a collateral proceeding on account of mere irregularities or errors apparent on its face. *Ib.*
4. ———: **Attorneys: Power to Represent Plaintiff.** In a collateral attack on a former agreed judgment rendered in behalf of plaintiff, an allegation that certain attorneys did not represent him in said former action is effectually disposed of by a recital in said judgment that said attorneys appeared for him. *Ib.*
5. **Bonds: City Indebtedness: Date of Judgment Misstated.** Where judgment against the city was rendered at one term, and on motion was set aside, and at a subsequent term another judgment for the same amount was rendered, and throughout the record it is admitted that the judgments were for the same indebtedness and that the voters voted for an issue of bonds to pay the said indebtedness, the fact that the ordinance, passed after the election and authorizing the issuance of the bonds, in its preamble described the judgment entered at the first term, does not invalidate the bonds. *State ex rel. City of Jefferson v. Hackman*, 156.
6. ———: **Indebtedness: Presentation of Written Claims.** A contention that the statute (Sec. 8313, R. S. 1919) required the claims against the city for an indebtedness should have been presented in writing verified by the claimants, is without force where the record shows the indebtedness was reduced to judgments in the circuit court; for all defenses to the claims were foreclosed by such judgments. *Ib.*
7. ———: **Defective Process: Waiver: Appearance.** The question whether process should have been served upon the mayor rather than the city clerk, in the suit by a creditor to recover judgment against the city, dropped out of the case when the attorney for the city appeared and filed answer. *Ib.*
8. ———: **Questioning Authority of Attorney for City.** The city is the only party that can question the authority of an attorney who appeared and filed an answer to a creditor's petition to recover judgment against the city. *Ib.*
9. ———: **Appointment of Acting City Attorney.** Under an ordinance providing that in case of his absence from the city, the city attorney may, with the approval of the mayor and at his own expense, appoint some competent attorney to act in his stead during such absence, an attorney appointed by the city attorney, whose appointment is approved by the mayor, has authority to represent the city in a suit brought by a creditor to recover judgment against the city for a debt due. Section 18 of Article 2 of the Constitution is no authority for questioning the acts of an attorney so appointed. *Ib.*

JUDGMENTS—Continued.

10. **Attorney: Disbarment: Indictable Offense.** A final judgment disbarring an attorney from practicing law on a charge that he has been guilty of an indictable offense, but not charging that he has been indicted and convicted, cannot be rendered, but before he can be finally disbarred the court hearing the disbarment proceeding must await the determination of the indictable offense in the court having charge of such criminal case. *Jones v. Sander-son*, 176.
11. ———: ———: ———: **Suspension: Final Judgment.** Where the information in a disbarment proceeding charges an indictable offense, but does not charge a trial and conviction, the power of the trial court is limited to a mere suspension of the attorney from practice until the facts can be ascertained in a trial upon an indictment. But a judgment disbarring an attorney for a period of twelve months from and after a certain date and finally disposing of the case, adding thereto a judgment for costs against him, is not a suspension, but a final judgment, and one the trial court had no power to render before an indictment and conviction. A suspension for a fixed term is not a judgment of suspension under the statute. *Ib.*
12. ———: ———: ———: **Power to Hear the Facts.** Where the information in the disbarment proceeding charges against an attorney indictable offenses, the court hearing the disbarment proceeding is without power to hear and determine the facts, but that power is by the statute placed in the court having charge of the criminal offenses mentioned in said information. *Ib.*
13. ———: ———: ———: **Jurisdiction: Waiver.** In a disbarment proceeding based upon an information charging an attorney with an indictable offense only, the circuit court is without power to hear and determine the facts tending to show him guilty of such offense; and if the court, nevertheless, proceeds to hear said facts and enters final judgment of disbarment based thereon, said judgment is in excess of its jurisdiction, and the attorney does not waive excessive jurisdiction by proceeding to trial, for there can be no waiver where the court is without power to hear and determine the facts. *Ib.*
14. **Imprisonment: Parole: Subsequent Conviction: Penalties Cumulative.** The terms of imprisonment of a person who has been convicted of a felony, has been paroled and again convicted of another felony and whose parole, after he has been again committed to the Penitentiary under the second conviction, has been revoked by the Governor, are cumulative and not concurrent; and under the statutes, his term of imprisonment under the second conviction does not begin until he has served out his sentence under the first. *Ex parte Lee*, 231.
15. ———: ———: ———: **Error in Bookkeeping.** And the fact that the books of the Warden of the Penitentiary and the Board of Prison Control show that, upon the reception of the convict under his second conviction, he was held and continued to serve under said second commitment and that he was discharged therefrom under the three-fourths rule for good behavior, does not affect the legality of his imprisonment under the first commitment for the balance of the term remaining after his parole was revoked. That was a mere error of bookkeeping, although the second commitment began before the parole under the first was revoked. *Ib.*

JUDGMENTS—Continued.

16. **Process: Idem Sonans.** A defendant named Hornbeck was served with a summons under the name of Hornback. *Held*, that the service and a judgment founded on it were valid, the two names being *idem sonans*. *Little v. Browning*, 278.
17. **Infancy: No Guardian.** Service of summons upon an infant defendant gives the court jurisdiction to proceed, and if it does proceed to judgment without appointing a guardian *ad litem* and there is no general guardian, the judgment, while erroneous, will not be subject to collateral attack. *Ib.*
18. **Appearance of Attorney: Infant.** In a suit against several defendants, one of them, an infant, was not served with process, but an attorney appeared and obtained leave of the court to file answer for all the defendants within ninety days. After the lapse of this time an entry of record was made setting forth the names of all the parties, reciting that the defendants had appeared at the last term of court and taken leave to file answer, but had said nothing further in bar of plaintiffs' action, and thereupon judgment followed. *Held*, that as to the infant defendant the judgment was void, *first*, because the leave to answer had been granted *ex mero motu* and constituted no evidence of an appearance by an unserved defendant; *second*, because of the infancy of this defendant. *Ib.*
19. **Jurisdiction: Appointment of Guardian: Collateral Attack.** An allegation that plaintiff minor and his mother were not residents of a certain county in Oklahoma, but of an adjoining county, and that therefore the county court of the particular county had no jurisdiction to appoint a guardian for him, is a collateral attack, and cannot succeed, when made in a suit in this State to annul the guardian's sale of the minor's lands. *Bopst v. Williams*, 317.
20. **Appeal: Non-Suit.** An appeal cannot be taken from an order overruling plaintiff's motion for a new trial and to set aside an involuntary non-suit taken by him as to a certain defendant. Such an order is not a final judgment. *Bonanomi v. Purcell*, 436.
21. **Fraudulent.** Relief from a judgment obtained by fraud may be had in equity, and a judgment so obtained constitutes a defense in law, and no judgment so obtained can be made the basis of a recovery. *Wagoner v. Wagoner*, 567.
22. **Divorce: Vacation of Judgment for Maintenance.** A fraudulent decree of divorce entered in a Nevada court did not *ipso facto* vacate, as of its date, a decree for separate maintenance in favor of the wife previously entered in a circuit court of this State. *Ib.*
23. ———: ———: **Fraud.** A citizen of Missouri cannot, without cause, desert his wife, and without her knowledge or consent go to a distant state, in which he was never domiciled, and there procure a divorce in her absence which will *ipso facto* vacate a former judgment in her favor for maintenance in a Missouri court in which was adjudicated the same facts against him. *Ib.*
24. ———: **Jurisdiction.** The person whose matrimonial status is affected by a judgment for divorce must be in the jurisdiction where it exists. A citizen of this State does not take with him the interest of his wife in the marriage status, so as to subject it to the jurisdiction of any foreign court which he may find sub-

JUDGMENTS—Continued.

servient to his purpose to get rid of her. The change of the domicile of the husband, who deserts his wife and goes to another state for the purpose of obtaining a divorce from her, does not draw after it the domicile of the wife. *Wagoner v. Wagoner*, 567.

- 25 **Divorce: Jurisdiction: For Maintenance.** A decree of a wife residing in Missouri, against her husband for separate maintenance, fixed her matrimonial status separate from his, and when he wrongfully went into another state for the purpose of avoiding his marital obligations such other state did not become her matrimonial domicile, either actual or constructive; and he could not carry her separate matrimonial status to such other state and there use it to give jurisdiction to a court of that state to set aside a judgment of a Missouri court which had fixed it. *Ib.*

26. ———: ———: ———: **Wife's Domicile Following That of Husband.** Ordinarily the matrimonial domicile of the wife follows that of the husband; but when the matrimonial unity is destroyed by a decree of court founded upon his misconduct, or is wrongfully repudiated by him, her matrimonial domicile remains in the state of her residence, and the court of a foreign state into which he has gone for the sole purpose of obtaining a divorce from her does not so acquire jurisdiction as to destroy her separate matrimonial status fixed by the decree of the Missouri court. In such case, the court of the foreign state does not obtain jurisdiction of the *res*—her separate matrimonial status—and whatever may be the effect on his rights and duties of its decree granting him a divorce, it is void in all things relating to her matrimonial status, and does not affect her rights under a former decree of a Missouri court adjudging her entitled to an allowance for separate maintenance, for such decree established her innocence of wrong in the matrimonial relation and her further right to be his wife wherever she might lawfully be. *Ib.*

27. ———: **Jurisdiction of Foreign Court: Fraud.** The presence of the husband's own matrimonial status in the foreign state to which he had gone for the purpose of obtaining a divorce being jurisdictional, fraud in obtaining a matrimonial status there would go to the very foundation of the jurisdiction of its court to grant him a decree; and where his acts show that he dismissed his suit for divorce pending in a Missouri court for the purpose of seeking a more kindly jurisdiction in another state, and thereby vacated the order for alimony *pendente lite* so as to leave her without means to follow him, and secured a judicial welcome in the other state by engaging board at two hundred dollars per month at a hotel and hiring out as an ornamental clerk at a store for seventy-five dollars per month, it is manifest that he induced the court in the foreign state by actual fraud to assume jurisdiction of his suit for divorce. *Ib.*

28. **Suit on Bond: Damages.** The law is settled in this State, by numerous decisions of the Supreme Court, that, in suit upon penal bonds with collateral conditions, the obligee, upon breach of condition, is not entitled to judgment for the full penalty of the bond, when a less sum is actually due; and hence the obligor can discharge himself by paying what is really due with interest and costs and thereupon the cause is discontinued. *State ex rel. Ford v. Elhison*, 683.

JURISDICTION.

1. **Judgment: Appearance of Attorney: Infant.** In a suit against several defendants, one of them, an infant, was not served with process, but an attorney appeared and obtained leave of the court to file answer for all the defendants within ninety days. After the lapse of this time an entry of record was made setting forth the names of all the parties, reciting that the defendants had appeared at the last term of court and taken leave to file answer, but had said nothing further in bar of plaintiffs' action, and thereupon judgment followed. *Held*, that as to the infant defendant the judgment was void, *first*, because the leave to answer had been granted *ex mero motu* and constituted no evidence of an appearance by an unserved defendant; *second*, because of the infancy of this defendant. *Little v. Browning*, 278.
2. **Quieting Title.** The Circuit Court of Pemiscot County, in a suit to ascertain and determine title, having determined that the lands were in New Madrid County, had no jurisdiction to adjudge "that the plaintiff has no right, title, claim or interest in and to said lands." *Alluvial Realty Co. v. Lbr. Co.*, 299.
3. **Matrimonial Status: Res.** The person whose matrimonial status is affected by a judgment for divorce must be in the jurisdiction where it exists. A citizen of this State does not take with him the interest of his wife in the marriage status, so as to subject it to the jurisdiction of any foreign court which he may find subservient to his purpose to get rid of her. The change of the domicile of the husband, who deserts his wife and goes to another state for the purpose of obtaining a divorce from her, does not draw after it the domicile of the wife. *Wagoner v. Wagoner*, 567.
4. ———: **Judgment for Maintenance.** A decree of a wife residing in Missouri, against her husband for separate maintenance, fixed her matrimonial status separate from his, and when he wrongfully went into another state for the purpose of avoiding his marital obligations such other state did not become her matrimonial domicile, either actual or constructive; and he could not carry her separate matrimonial status to such other state and there use it to give jurisdiction to a court of that state to set aside a judgment of a Missouri court which had fixed it. *Ib.*
5. ———: ———: **Wife's Domicile Following That of Husband.** Ordinarily the matrimonial domicile of the wife follows that of the husband; but when the matrimonial unity is destroyed by a decree of court founded upon his misconduct, or is wrongfully repudiated by him, her matrimonial domicile remains in the state of her residence, and the court of a foreign state into which he has gone for the sole purpose of obtaining a divorce from her does not so acquire jurisdiction as to destroy her separate matrimonial status fixed by the decree of the Missouri court. In such case, the court of the foreign state does not obtain jurisdiction of the *res*—her separate matrimonial status—and whatever may be the effect on his rights and duties of its decree granting him a divorce, it is void in all things relating to her matrimonial status, and does not affect her rights under a former decree of a Missouri court adjudging her entitled to an allowance for separate maintenance, for such decree established her innocence of wrong in the matrimonial relation and her further right to be his wife wherever she might lawfully be. *Ib.*

JURISDICTION—Continued.

6. **Service of Process.** Where the husband and wife had for years occupied a certain property as a home, and after he had brought suit for divorce he fraudulently induced her as a part consideration for an allowance of suit money to leave said residence, a service of process on a maid in said home, in her suit for a separate maintenance allowance, brought after he had dismissed his suit for divorce, the said maid and his mother being the only members of his family, is a valid service, and brought him into court, although he was not in the State at the time. *Wagoner v. Wagoner*, 567.

JUST COMPENSATION FOR PUBLIC SERVICE. See *Corporations*.

LACHES.

1. **Unreasonable Delay.** Where a party rests upon his rights, and fails to bring a suit when he might have done so, for a period short of the period of limitations, in a proceeding in equity, relief may be denied on the ground of unreasonable delay, where circumstances intervene to work hardship upon defendant in making his defense. Where, by reason of delay, evidence becomes unavailable, or important witnesses have died and it becomes impossible to ascertain the facts, laches will bar recovery. *Price v. Boyle*, 257.
2. ———: **Accounting by Trustee.** Where the administration of the estate closed in 1877, and the trustee, who was executor, if he appropriated any of the life estate, begun to do so during that administration, and the *cestui que trust*, then sixty years of age, made no complaint; there was no complaint during the subsequent thirty years, but letters were introduced breathing the greatest confidence in him on the part of the *cestui que trust* and her daughter; there was no intimation that the mother during said thirty years was not entirely satisfied with his management of the estate; after her death in 1907, and his in 1911, all that remained to show the state of the account were the public records and such statements as he had rendered his mother during her lifetime; such statements in detail rendered during several years of his trust were produced in evidence, which indicates that other statements covering the rest of the time were rendered; her daughter had possession of all papers her mother possessed relating to the estate, and she testified that she destroyed most of those papers; no account book was presented; the suit for an accounting was brought by the administrator of the *cestui que trust* four years and 364 days after her death, and at the instigation of her daughter, who was disappointed in the provisions of the trustee's will, and was brought more than a year after his death; by the suit it is attempted to charge him with the consideration mentioned in a deed for real estate exchange for other property, and the trustee alone could explain whether such named sum was the real consideration, and the only evidence that he had not accounted in full for the trust estate is the fragmentary papers which his sister had neglected to destroy when she destroyed the other statements rendered, it will be held that the suit is barred by laches. *Ib.*
3. ———: **Certiorari to Court of Appeals: Delay in Application.** Where application for a writ of *certiorari* to review a decision of a Court of Appeals on the ground of conflict with controlling decisions of the Supreme Court was not made until more than nine months after the motion for rehearing was overruled and more than seven months after the opinion of the Court of Appeals had been certified

LACHES—Continued.

to the circuit court and judgment entered there pursuant to such opinion, and the applicant for the writ had not applied to the Court of Appeals for a stay of mandate to enable him to apply for the writ of *certiorari*, there was such delay and laches on the part of the applicant as to require the writ to be quashed. State ex rel. Berkshire v. Ellison, 654.

4. ———: ———: **Excuse.** The applicant having taken no action in the Court of Appeals to secure a stay of mandate until application could be made for the writ, it is no excuse that applicant, four months after the mandate had gone down to the circuit court and judgment pursuant thereto had been entered by that court, applied to the Supreme Court for a mandamus to the Court of Appeals to so write its opinion as to state the facts, as a preliminary step toward applying for the writ of *certiorari*, which application for a mandamus was denied three months before the application for the writ of *certiorari* was made. Ib.

LANDS AND LAND TITLES.

1. **Curtesy: Deed by Wife Alone.** The estate of the husband, both by the curtesy initiate and by the curtesy consummate, is completely wiped out by a conveyance by the wife of her separate real estate during her lifetime, regardless of his failure or refusal to join in her deed. Brook v. Barker, 13.
2. ———: ———: **Married Woman's Acts.** The Married Woman's Acts of 1889, declaring (in Sec. 7328, R. S. 1919) that all real estate belonging to any woman at her marriage, or which may have come to her during coverture by gift or inheritance, or by purchase with her separate money or means, shall be and remain "her separate property and under her separate control," and by declaring (in Sec. 7323, R. S. 1919) that "a married woman shall be deemed a *femme sole*" so far as to enable her "to contract and be contracted with," gave to a married woman the unrestricted right to convey her said real estate by her sole deed, without her husband joining therein, and such a conveyance by her alone extinguishes his curtesy in her real estate so conveyed. Ib.
3. **Purchase of Land: Oral Contract: Specific Performance.** The Statute of Frauds is an insuperable barrier to the enforcement of an oral contract for the purchase of land, unless the proof of such contract is so clear, cogent and convincing as to leave no reasonable doubt in the mind of the chancellor as to its terms and conditions; and where part performance is relied upon to take the case out from under the operation of the statute, there must be like proof that the acts performed refer to the contract and would not have been done unless on account of and in pursuance to it and with a direct view of its performance. Scheerer v. Scheerer, 92.
4. ———: ———: **Part Performance: Possession.** Taking and continuing in possession by the vendee under an oral contract for the purchase of land, with the vendor's consent, the payment of a substantial part or all of the purchase price, and the making of substantial improvements, are acts of performance when referable solely and unequivocally to the contract. The taking of possession alone is not generally recognized as sufficient part performance, but taking possession, followed by the further act of part payment, or the making of improvements, is sufficient to validate the parol contract. Ib.

LANDS AND LAND TITLES—Continued.

5. **Purchase of Land: Oral Contract: Part Performance: Signing Deed.** Where the vendee made substantial part payment, went into possession, made valuable improvements, and afterwards made other substantial part payments, all referable solely to the parol contract of purchase, and a receipt for a large payment was given with the vendor's name attached thereto, and his testimony as to whether he signed the receipt is evasive, and he signed a deed in exact harmony with and in pursuance to the parol agreement, which he refused to deliver and accept a deed of trust for the balance, the evidence showing that a desire to avoid taxes being controlling, the contract will be specifically enforced, there being no other rational hypothesis on which the signing of the deed can be explained. *Scheerer v. Scheerer*, 92.
6. ———: ———: **Indefinite Terms: Cured by Interpretation.** An objection that the parol contract pleaded is indefinite as to the payments to be made by the vendee before the vendor would make a deed, is cured by an allegation and proof that on the making of certain payments the vendor agreed to make a deed, which he did sign but did not deliver, for this was an interpretation of the contract which made it definite. *Ib.*
7. ———: ———: **Time of Payment: Interest as Compensation for Delay.** Where the time of payment of the purchase price of land was optional with the vendee, as it suited his convenience, the law implies a reasonable time; and where the vendor accepted a second payment five years after the sale, time was not of the essence of the contract. And ordinarily, where the time of payment of the purchase is optional with the vendee, the payment of interest on the deferred payments will be sufficient compensation for the delay. *Ib.*
8. ———: ———: **Homestead: Wife's Consent.** Where the land the vendor orally agreed to sell was his homestead, enforcement will not be denied on the ground that he could not sell it without the concurrence of his wife, where he sold it with the intention of abandoning it, acquired another homestead which he still occupies, accepted payments on the purchase price years after the sale, and permitted the vendee to remain in possession, exercising acts of ownership, for fifteen years. *Ib.*
9. ———: ———: **Specific Performance: Wife's Inchoate Dower.** The wife not being a party to the parol contract for the sale of land or to the suit to specifically enforce, although it is clear that it was mutually understood that the vendee was to have a deed executed by both the vendor and his wife, and the vendee being entitled to a decree of specific performance, the purchase price should be diminished by the value of the wife's inchoate dower, unless she will join the vendor in the execution of a deed. *Ib.*
10. **Conveyance: Deposit of Deed With Bank: Agent or Trustee.** The physical delivery of a deed to a bank, accompanied by written instructions that it was to be delivered to the grantee upon the grantor's death, and the grantor's contemporaneous and subsequent declarations to the effect that he had deeded everything he had to the grantee and wanted her to have it at his death, created no relation of agency between the bank and the grantor, but the deposit being unconditional the bank, in accepting it, became a trustee of an express trust and as such charged with the performance of the duties defined for the grantor and the grantee. *Meredith v. Meredith*, 250.

LANDS AND LAND TITLES—Continued.

11. ———: ———: **Delivery Upon Grantor's Death.** A delivery of a deed by the grantor to a third party to be held by him and delivered to the grantee upon the grantor's death will operate as a valid delivery, where no reservation is made in the deed nor any right of control over the instrument is retained by the grantor. *Ib.*
12. ———: ———: **Retaining Possession of Land.** A deed, unconditional in its terms and beyond the control of the grantor after its delivery to a depository with specific directions to deliver it to the grantee upon his death, although not conferring an immediate right of present possession, constitutes such an investiture of title as to give the grantee a present fixed right of future enjoyment, although the use of the land is retained by the grantor during his life. *Ib.*
13. ———: ———: **Acceptance.** Acceptance of a deed after the grantor's death dates back to the time of its delivery to the depository, and renders it a transfer of the title as of that date. *Ib.*
14. ———: ———: **Evidence of Agency.** The cashier having defined his relation to the grantor, showing that it was in no wise different from that sustained by him to other patrons of the bank, it was not error to exclude testimony tending to show that the cashier was the agent of the grantor throughout the transaction by which the grantor delivered to him a deed to be delivered to the grantee upon the grantor's death. *Ib.*
15. **Sale of Minor's Real Estate: Contingent Remainder.** A contingent remainder in lands is a vendible interest by a person *sui juris* or under execution, despite the fact that the person or persons who will ultimately take cannot be determined until the death of the life tenant; and if the apparent remainderman is a minor, his contingent interest can be sold by his guardian when properly authorized by the probate court. *Bopst v. Williams, 317.*
16. ———: **Payment of Purchase Price: Dissipation.** The failure of the guardian to account in the proper court for the purchase price of the minor's land, or the dissipation or embezzlement of it by the guardian, does not concern the grantee if the sale was otherwise good; and a recital in the probate record, repeated in the deed, of the receipt of the purchase price in cash cannot be disproved to defeat the title of an innocent purchaser, without notice and for value, from the purchaser at the sale. *Ib.*
17. ———: **Appraisal of Contingent Remainder.** Where the life tenant's interest was computed at a sum substantially less than its value when computed by the statutory tables, and the minor's contingent interest was appraised at a sum in excess of the value of an indefeasible and vested remainder, the appraisal furnishes no basis for an attack upon the sale by the guardian of the minor's contingent interest. *Ib.*
18. ———: **Sale to Guardian.** Under the statute, and in the absence of a statute, a purchase by the guardian of the minor's real estate, directly or indirectly, even though approved by the probate court, and even though the sale is at a fair price, is ground, in itself, upon which the interested party may avoid the sale; and whether the deed be held void on its face, or only voidable, is immaterial

LANDS AND LAND TITLES—Continued.

- in a suit in equity in which all the facts showing plaintiff's right to avoid the sale are set up in the petition. *Bopst v. Williams*, 317.
- 19 **Sale of Minor's Real Estate: To Guardian's Husband.** A sale of the minor's land by the guardian to her husband is voidable in a suit by the minor to set it aside; under the statute and at common law, even though it was at the appraised value and confirmed by the court. And although she had a life estate which would preclude dower vesting in her, yet whatever interest her husband took by her guardian's deed she would have been entitled to share by election under our statutes had she survived him and on the ground of prospective interest, and on the additional ground which arises out of the nature of the marriage relation, she should be considered a purchaser "indirectly." *Ib.*
 20. ———: ———: **Innocent Purchaser.** The relation between the guardian and vendee may be shown by the records through which defendant deraigns title; where the decree in partition recites that the guardian and W. E. Shenk are "husband and wife" and says that she has a life estate and her minor child a remainder in the land set off to them, and she as guardian of the minor sells the minor's interest to "William E. Shenk" and Shenk's deed to defendant contains a recital of the relationship of William E. Shenk and his wife (the said guardian), the defendant purchased with notice that the grantee in the guardian's deed was her husband. *Ib.*
 21. ———: **Allowance for Improvements.** Where the trial court held that the guardian's deed conveying the land should be set aside, and the plaintiff did not file a motion for a new trial nor appeal, he cannot be heard to complain in the appellate court of the amount allowed to defendant for improvements. *Ib.*
 22. **Conveyance: Reserving Life Estate: Testamentary.** A deed of gift in the usual form of a general warranty deed in fee contained a clause declaring that the land should "remain the property of the grantor during the term of his natural life." This deed was immediately delivered and recorded. *Held*, that it did not operate a testamentary disposition of the land, but was a present conveyance in fee subject to the life estate only, and took effect immediately upon delivery. A subsequent deed from the same grantor passed his life estate, but nothing more. *McAllister v. Pritchard*, 494.
 23. **Particular Estate Dependent on Contingency: Limitations Consecutive Thereon Likewise Dependent.** When a contingent particular estate is followed by other limitations, the rule is that, if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and, therefore, appear not reasonably applied to the ulterior limitations. *Bernero v. Trust Co.*, 602.

LAWS.

1. **Retrospective Operation: Remedy.** The provision of the Constitution declaring that no law "retrospective in its operation can

LAWS—Continued.

be passed by the General Assembly" applies only to acts which would affect vested rights, and not to statutes which are remedial only. No one has a vested interest in the form of procedure; no one has a vested right to have his cause tried by any particular mode. Acts changing remedies in any way that does not destroy or impair vested rights are excluded from the operation of said constitutional provision, even when they are intended to apply to existing conditions. The remedy applies to the future, but as a remedy it may operate upon properly rights and interests already vested. To be retrospective in the constitutional sense it must impair a vested right. *McManus v. Park*, 109.

2. **Title.** Where the terms of an act are ambiguous, recourse may be had to its title to ascertain the intention of the Legislature; and the intention expressed in the title of the Act of 1911, requiring trustees to report annually to the circuit court the condition of the estate, clearly shows it is retroactive in its operation, and applies to all trustees. *Ib.*
3. **Constitutional Question: Not Raised at Trial.** A contention that an act is unconstitutional as class legislation, if the question was not raised in the trial court, cannot be considered on appeal; on the contrary, appellant can appropriately urge on appeal a construction of the statute which will render it constitutional, if that contention was made below. *Ib.*
4. **Constitutional Law: Title: Construction.** The constitutional provision requiring the subject of a law to be clearly expressed in its title must be reasonably and liberally construed and applied, due regard being had to its object and purpose, the principal purpose being to prevent surprise and fraud upon the members of the General Assembly by barring the insertion of matter in the body of the bill of which the title gives no intimation. *Asel v. City of Jefferson*, 195.
5. ———: ———: **Subject: General.** So long as the title to a law does not cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection, it is not subject to an objection for generality. *Ib.*
6. ———: ———: ———: **Reference to Prior Statute.** The mere reference in the title of an act to a previous act, without other description of the subject-matter, gives notice that the new section to be enacted will deal with the same subject contained in the section to be repealed. So that where the title of the Act of 1915 was, "An Act to amend Chapter 84, Article 4, of the Revised Statutes of the State of Missouri, 1909, in relation to municipal corporations, by adding thereto a new section to be known as Section 9237a," the title to the Act of 1919, which was "An Act to repeal 'An Act to amend Chapter 84, Article 4, of the Revised Statutes of Missouri, 1909,' in relation to municipal corporations as it appears in the Laws of Missouri, 1915, at page 359, and approved March 24, 1915, and to enact a new section in lieu thereof to be known as Section 9237a," did not violate the constitutional provision requiring the subject of a law to be clearly expressed in its title, although the Act of 1915 provided only for the sprinkling and oiling of streets, and the Act of 1919, in addition to providing for the sprinkling and oiling of streets, provided for their repairing, surfacing and re-surfacing. *Ib.*

LAWS—Continued.

7. **Constitutional Question: Constitutional Law: Title: Subject: Caption or Head-Note of Prior Act.** By the title of said Act of 1919 the members of the Legislature were informed that the bill related to municipal corporations and proposed to repeal an act amending Chapter 84 of Article 4 of the Revised Statutes of 1919, appearing in the Laws of 1915, at page 359, and to enact a new section in lieu thereof, and by reference thereto their attention was directed to said Act of 1915; and by turning to the Act of 1915, they would have found its caption or head-note to be: "Municipal Corporations—Cities of the Third Class—Oiling and Sprinkling Streets—Special Tax Bills," which, for the purposes of such reference, became a part of the title to the Act of 1919, then under consideration, and they would thereby have been specifically informed as to the general subject and nature of the legislation sought to be enacted by the Act of 1919; and since the caption or head-note of the Act of 1915 referred to the "oiling and sprinkling of streets," the legislators, by referring to it, would readily have realized that the subject of the new section to be enacted by the proposed Act of 1919 would necessarily relate to the care and maintenance of streets, a subject closely related thereto; and since the body of the Act of 1919 continued to treat of the "oiling and sprinkling" of streets, together with the kindred subject of "repairing, surfacing and re-surfacing" thereof, it cannot be held that the Legislature was misled by the title of the Act of 1919, or that said title did not give notice that the body of the Act of 1919 would contain additional provisions for repairing, surfacing and re-surfacing of streets. *Asel v. City of Jefferson*, 195.
8. ———: ———: **Congruous Subjects.** The "repairing, surfacing and re-surfacing" of streets are cognate and related to the "oiling and sprinkling" of streets. *Ib.*
9. **Conflicting Statutes: Resurfacing and Reconstruction of Streets: Later Enactment: Remonstrance.** Although the Act of 1919 conflicts with Sections 9254 and 9255 of the Act of 1911, Laws 1911, page 337-341, since the two acts provide for an entirely different method of procedure as to the paving and re-surfacing of streets, and in that respect are inconsistent and both cannot operate together, yet the Act of 1919, being a later enactment, necessarily repeals the Act of 1911, and proceedings for resurfacing a street based on the Act of 1919 are not invalid because of said conflict, notwithstanding the Act of 1911, makes provision whereby resident owners may protest against any proposed paving, while the Act of 1919 contains no such provision. *Ib.*
10. **Constitutional Law: City Ordinance Requiring Vigilance in Operating Street Cars.** It is well settled by the decisions of this court that city ordinances are valid which impose upon motormen operating street cars in the city the duty of keeping a vigilant watch for persons on the track or moving toward it, and of stopping the car on the first appearance of danger in the shortest time and space possible, and of ringing the gong in quick succession on approaching any team or person. *Hale v. St. Joseph Ry. Co.*, 499.
11. **Timely Warning: Awaiting Apparent Peril.** Under the vigilant watch ordinance in evidence the motorman cannot delay the sounding of his gong in quick succession until persons, teams or vehicles are actually going upon the track in front of his approaching street car; or are in an actual position of danger; he must take affirmative action to give them timely warning of his approach. *Ib.*

LEGITIMACY. See **Children.**

LIBEL.

1. **Limitations: Effect of Imprisonment and Bail.** Under the statute (Sec. 1323, R. S. 1919) declaring that "if any person entitled to bring an action in this article specified, at the time the cause of action accrued be imprisoned on a criminal charge, or in execution under a sentence of a criminal court for less than his natural life, such person shall be at liberty to bring such actions within the respective times in this article limited after such disability is removed," an action for libel brought by a person who is neither imprisoned nor physically restrained during the pendency of a prosecution against him for murder is barred by limitations if not brought within two years after the libel was published. *Hyde v. Nelson*, 130.
2. ———: ———: **Bail.** The giving of bail by a defendant in a murder charge does not stop the running of the Statute of Limitations against his civil action for libel. That "the principal is supposed to be in the bail's constant custody" is a legal fiction, and does not amount to imprisonment or physical restraint. The purpose of admitting an accused to bail is to relieve him of imprisonment, and in spite of it he is at liberty until his sureties surrender him. *Ib.*
3. ———: ———: ———: **Habeas Corpus.** One who has been admitted to bail is not entitled to the writ of *habeas corpus* for the purpose of obtaining his discharge. A prisoner released on bail is at liberty, and one at liberty is not imprisoned. The fact that a defendant in a murder charge gave sufficient bail and thereafter, being wrongfully committed to jail, was discharged on *habeas corpus*, did not amount to imprisonment or prevent him from bringing his civil action for libel. *Ib.*
4. **Survival.** Under the statutes, if the libeler dies before suit is brought, no action for libel can be maintained against his devisees or executor or administrator. *Ib.*

LIBERTY LOANS. See **Negotiable Instruments**, 13 to 17.

LIMITATIONS.

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LIMITATIONS—Continued.

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MANDAMUS.

1. **Demurrer: General Grounds: Failure to Brief: Abandonment.** The general grounds of a demurrer in an original proceeding in the Supreme Court will be considered as abandoned if neither briefed nor urged. If the brief does not urge the general ground that the city did not have power to issue bonds for the purposes for which they were issued, but the objections are confined to irregularities in the issuance of them, the question of the power of the city to issue them will be considered as abandoned. *State ex rel. City of Jefferson v. Hackmann*, 156.
2. **Issue of Bonds: Duty of State Auditor: Reviewable Error.** While it is the duty of the State Auditor to see to it that the requirements of the applicable statutes have been complied with before registering bonds issued by a city, his errors in judgment are reviewable by the Supreme Court in mandamus. *Ib.*

MANN ACT. See **Criminal Law**, 1 to 6.

MARRIAGE.

1. **Illegal: Divorce: Adultery: Legitimacy of Children.** Section 342, Revised Statutes 1909, provides that "the issue of all marriages decreed null in law or dissolved by divorce shall be legitimate." In order that a child may be legitimate within the meaning of this statute, there must have been not only a marriage between the parents, but such a marriage as would be decreed null in law or dissolved by divorce in a proceeding in equity between them. In an action to annul a marriage in equity, for any reason, or for divorce, if both parties knowingly lived in adultery, there would be no marriage to annul and neither would be an innocent or injured party; neither would come into court with clean hands, and no relief could be granted to either. Unless the marriage is entered into by one or both of the parents honestly, innocently and in good faith it is not such a marriage as is contemplated by this section. *Stripe v. Meffert*, 366.
2. **Legitimation of Children.** Section 341, Revised Statutes 1909, provides that "if a man, having by a woman a child or children, shall afterwards intermarry with her and shall recognize such child or children to be his, they shall thereby be legitimated." This applies to cases where the relationship between the parties at the time the child was conceived was illegal and criminal as to both parents. In such case a subsequent legal marriage and recognition is necessary to legitimacy. *Ib.*

MARRIAGE—Continued.

3. ———: **Adultery: Guilty Knowledge of Parties.** Where the evidence showed that both the parents were knowingly guilty of adultery, the child cannot be held legitimate under Section 342 at all, and not under Section 341 unless there has been a subsequent marriage between the parents accompanied by recognition by the father. *Ib.*
4. ———: ———: **Non-Access: Presumption.** In cases where the question is whether the paramour or husband of the mother is the father of the child, the non-access of the husband is required to be shown by clear and convincing proof; otherwise, the presumption is that the husband, and not the paramour, is the father. *Ib.*

MARRIED WOMEN.

1. **Curtsey: Deed by Wife Alone: Married Woman's Acts.** The married Woman's Acts of 1889, declaring (in Sec. 7328, R. S. 1919) that all real estate belonging to any woman at her marriage, or which may have come to her during coverture by gift or inheritance, or by purchase with her separate money or means, shall be and remain "her separate property and under her separate control," and by declaring (in Sec. 7328, R. S. 1919) that "a married woman shall be deemed a *femme sole*" so far as to enable her "to contract and be contracted with," gave to a married woman the unrestricted right to convey her said real estate by her sole deed, without her husband joining therein, and such a conveyance by her alone extinguishes his curtesy in her real estate so conveyed. *Brook v. Barker*, 13.
2. **Purchase of Land: Oral Contract: Specific Performance: Wife's Inchoate Dower.** The wife not being a party to the parol contract for the sale of land or to the suit to specifically enforce, although it is clear that it was mutually understood that the vendee was to have a deed executed by both the vendor and his wife, and the vendee being entitled to a decree of specific performance, the purchase price should be diminished by the value of the wife's inchoate dower, unless she will join the vendor in the execution of a deed. *Scheerer v. Scheerer*, 92.
3. **Guardian: Competent to Sell Real Estate.** A married woman, competent under the laws of the foreign state of her residence to be guardian of a minor child residing there, may be permitted by the probate court of this State to sell the minor's lands. The statute (Sec. 411, R. S. 1919) does not require the foreign guardian to possess the qualifications required of a resident guardian, but only requires that the non-resident minor shall have "a guardian in the estate or territory in which he resides." *Bopst v. Williams*, 317.
4. ———: **Sale to Guardian's Husband.** A sale of the minor's land by the guardian to her husband is voidable in a suit by the minor to set it aside, under the statute and at common law, even though it was at the appraised value and confirmed by the court. And although she had a life estate which would preclude dower vesting in her, yet whatever interest her husband took by her guardian's deed she would have been entitled to share by election under our statutes had she survived him; and on the ground of prospective interest, and on the additional ground which arises out of the nature of the marriage relation, she should be considered a purchaser "indirectly." *Ib.*

MINORS. See Infants.

MOTION FOR NEW TRIAL.

1. **Assignment by One of Several Appellants.** One of a group of defendants may, in his motion for a new trial, adopt an objection made by another defendant to a ruling of the trial court in admitting evidence and base an assignment of error thereon. *State ex rel. Brew. Co. v. Ellison*, 139.
2. **Trial: Special Verdict: Incomplete Determination.** Where there is a special verdict, leaving some of the issues to be determined, a motion for a new trial filed within four days after their determination, is timely filed. *Stripe v. Meffert*, 366.

MOTION TO MAKE DEFINITE AND CERTAIN.

Pleading: Failure to State Cause of Action: Objection at Trial. Where a motion to make the petition more definite and certain is overruled and no exception saved and a demurrer to the petition is overruled and thereafter an answer is filed and the case goes to trial, a general objection by defendant to any evidence on the ground that the petition does not state a cause of action, must be treated as if such motion and demurrer had never been filed; and in such case the petition will be regarded as sufficient after judgment, if, after allowing all reasonable implications and inferences in its favor, there is a sufficient statement to apprise defendant with reasonable certainty of the character of the action and the issues to be met. The Court of Appeals having so decided, its decision is not in conflict with previous rulings of the Supreme Court. *State ex rel. Pack. Co. v. Reynolds*, 697.

NEGLIGENCE.

1. **Excessive Verdict: Passion and Prejudice: Reversal.** Where plaintiff's evidence upon the merits of the controversy is substantial and no error was committed against defendant during the progress of the trial, a verdict for a reasonable amount will be upheld on appeal. But if the verdict, in the light of all the facts, appears to have resulted either from passion or prejudice on the part of the jury, the judgment will be reversed, and the cause remanded for a new trial. *Jones v. Frisco Ry. Co.*, 64.
2. ———: ———: ———: **Contradictory Testimony.** Where plaintiff was a trespasser upon defendant's moving freight train, and testified that as he attempted to climb up the iron ladder of a car a brakeman on the top of the car struck him with an axe-handle, knocked him off, he fell on sandy ground which sloped towards the track, he rolled towards the track and the car wheels cut off his foot, and five witnesses testified that he told them on the day of the accident that he got on a car which was two or three cars ahead of the car which one of his companions had boarded, that he wanted to get off and get back to the car where such companion was, and that, in doing so, he fell off of the car and got his foot cut off, and these witnesses were either guilty of wilful perjury in so testifying, or plaintiff was guilty of perjury in denying that he made such statements to them; and where the conductor of the train and a brakeman testified that both brakemen were in the caboose at the time of the accident, and no brakeman was on the top of any car; and where the evidence is overwhelmingly against plaintiff as to the manner in which he

NEGLIGENCE—Continued.

claims to have been injured, and the jury, nevertheless, ignored it and returned a verdict for \$15,000, which was \$2500 more than the trial court ruled was reasonable compensation, and which the Supreme Court considers was excessive, at least to the extent of \$5,000, if no error had been committed during the progress of the trial, it will be ruled that the verdict was the result of passion or prejudice on the part of the jury, and that justice requires that the judgment be reversed, and the cause remanded for a new trial. *Ib.*

3. **Brakeman: Authority to Eject Trespassers.** In this case there was sufficient evidence to enable the jury to determine whether or not the brakemen on defendant's moving freight train were authorized, while acting in the line of their duty, to eject trespassers from the train. *Ib.*
4. **Instructions: Measure of Damages: Misleading.** If defendant is fearful that a given instruction on the measure of damages, of itself unobjectionable, may in some way mislead the jury, it is defendant's duty to ask for an instruction declaratory of the law from its viewpoint. *Ib.*
5. ———: ———: **Evidence: Personal Injuries: Members of Family: General Objection: Repetition.** It is settled law in this State, and has been since *Dayharsh v. Railroad*, 103 Mo. l. c. 577, that, in an action for damages for personal injuries negligently inflicted, it is error to admit, over proper and timely objection, evidence of the number of plaintiff's children and who compose his family; and while the Court of Appeals so held, its ruling that a general objection was insufficient to save the point was error, and conflicts with prior decisions of the Supreme Court, in view of the fact that the evidence was incompetent for any purpose, and a general objection to it was timely made, and the general objection held inadequate by the Court of Appeals was made, not to a new question, but to a repetition of the question after the trial court had ruled the evidence admissible. *State ex rel. Brew. Co. v. Ellison*, 139.
6. **Board of Education: Liability.** On the ground of its legal character alone as a quasi-corporation, the Board of Education of the City of St. Louis is not answerable in damages for negligence in the matter of keeping school grounds in a reasonably safe condition for pedestrians. *Cochran v. Wilson*, 210.
7. ———: ———: **Governmental Function.** In the exercise of the duty conferred upon it by statute of erecting and maintaining public schools for the education of children, a school district, and especially the Board of Education of the City of St. Louis, performs a public or governmental power, and not a special corporate or administrative duty, and is not liable in damages for the negligence acts of its officers or agents in maintaining or repairing school buildings or grounds. *Ib.*
8. ———: ———: **Trust Funds.** School funds are collected from the public to be held in trust by boards of education for the specific purpose of education, and an attempt to otherwise apply them is without legislative sanction and finds no favor with the courts. Such funds are similar to the funds of a charitable hospital, which, being devoted to a specific purpose, cannot be diverted or absorbed

NEGLIGENCE—Continued.

by claim arising from the negligence of its trustees or employees. *Cochran v. Wilson*, 210.

9. **City: Injury to Pedestrian.** Unless the ground upon which a pedestrian was walking at the time she fell down a series of steps was a public highway, she cannot recover damages from the city. *Ib.*
10. ———: ———: **Steps on School Ground.** The space between a school building and a theatre was paved with granitoid and used as a thoroughfare by pedestrians passing from the street in front of the buildings to the next parallel street. The space was school ground, and in it was a series of four or five granitoid steps leading down to an entrance to the theatre. The grounds were unlighted, and plaintiff, walking along the paved passageway at night, fell down the steps and was injured. *Held*, that the liability of the city is dependent upon whether the space can be classed as a public highway, and it could become a public highway only by condemnation, formal dedication or adverse user. *Ib.*
11. **Highway: School Grounds: Condemnation.** The land on which the steps were located where plaintiff fell and was injured being the property of the Board of Education, it could not be condemned as a highway, having already been devoted to a public use. *Ib.*
12. ———: ———: **Adverse User.** The statute providing that statutes of limitation shall not extend to lands given, granted, sequestered or appropriated to any public, pious or charitable use, nor to any lands belonging to the State, a strip of land belonging to the Board of Education and used as a necessary appurtenance to one of its school buildings cannot become a public highway by adverse user. Besides, even if by adverse user it could become a public highway, there was no showing of such continuous use for a term of years as caused it to ripen into a prescriptive right to use the passageway as a highway. *Ib.*
13. **Verdict: Unreasonably Small: Inadequacy.** An appellant has the right to have set aside a verdict for personal torts either excessively large or ridiculously small, where the result indicates passion, prejudice or misconduct on the part of the jury. In determining whether it is such, the presumption is in favor of the good conduct of the jury; and if upon the whole record the case predominates in favor of the defendant or the evidence is evenly balanced, the courts will refuse to interfere with a nominal verdict, although at first view it may appear illogical. Inadequacy of the award is not alone a sufficient basis for setting aside the verdict. *Ib.*
14. ———: ———: **Liability of Defendant.** And where there is no evidence that the space between the school building and the theatre was in control of the theatre owner, and the trial court might for that reason have sustained a demurrer to the evidence, the verdict of \$250 for a pedestrian, who was directed by said defendant's employee to enter the theatre from said passageway, will not be disturbed upon plaintiff's appeal alone. *Ib.*
15. **Pleading: General and Specific Injuries: Resultant Damages: Natural and Necessary.** When the petition alleges special damages in a personal injury case, the proof must be limited to the special damages pleaded. Where a specific result necessarily follows from

NEGLIGENCE—Continued.

an alleged injury it is not necessary to plead it, but where it is the natural but not the necessary result of the injury it must be pleaded, in order to admit evidence of it. Also if an allegation of damage contains a general term in describing what follows the injury, then any result coming within the content of that term may be proved without specific allegation; and if the petition contains any allegation of a general nature which may be said to embrace within the general term a resultant damage sought to be proven, and defendant is not satisfied with the general allegation, he should move to make more specific. *Mayne v. K. C. Rys. Co.*, 235.

16. ———: ———: ———: ———: **Injury to Pelvic Cavity: Impaired Functions: Child Birth.** Where the petition alleges that the bones surrounding the pelvic cavity were broken and crushed, and the organs within the cavity were crushed, and after describing the broken condition of the bones and the dislocation and rupture of the ligaments alleges that "the functions of all of which organs have been seriously and permanently impaired," it contains an allegation of an injury in such general terms as to authorize proof of plaintiff's inability to give birth to a child, since one of the functions of the organs so impaired was child-bearing, and inability to bear children is a necessary result of a permanent impairment of those organs. *Ib.*
17. **Res Ipsa Loquitur: Passenger.** In determining, whether the doctrine of *res ipsa loquitur* applies to a case, it does not matter whether the injured party was a passenger on defendant's street car which injured her. *Ib.*
18. ———: **When Applicable: Cases for Plaintiff.** When the instrumentality which causes an injury is within the control of and operated by defendant, and moves or is operated in such a way that such motion or operation would not have happened except for some defect or negligent act, and injury results, the doctrine of *res ipsa loquitur* applies, and a plaintiff suing for an injury so caused has only to show control of the instrumentality by the defendant and its usual movements. It is then for defendant to explain, if it can, the casualty, so as to exclude negligence on its part. *Ib.*
19. ———: ———: ———: **Erratic Street Car.** As a street car was being backed, the hind wheels went as they were intended to go and the front wheels veered off by reason of a split switch and caused the front end of the car to swing around and strike plaintiff standing on a sidewalk, the movement being one that could not have happened except for some defect in the car or track or some negligence in its management, and the machinery and all the appliances being peculiarly within the knowledge of defendant. *Held*, that the defendant was charged with the burden of explaining the casualty; and if by its testimony it only showed that the track, the car and the wheels were in good condition, but made no showing of what caused the split switch and the consequent erratic movement of the car, an instruction authorizing a recovery by plaintiff, if technically incorrect because it made reference to plaintiff as a passenger, is not reversible error. *Ib.*
20. **Excessive Verdict: \$20,000.** Where plaintiff's injuries were unusual in severity and painfulness, rendering her a cripple for

NEGLIGENCE—Continued.

life and incapable of normal activities and life's most fruitful enjoyments, a verdict for \$20,000 is not excessive. *Mayne v. K. C. Rys. Co.*, 235.

21. **Contributory.** Even where the defendant is guilty of acts of negligence which furnish the opportunity of plaintiff's injury, still if plaintiff is guilty of reckless acts which are the immediate cause of his injury he cannot recover damages for it. *Bonanomi v. Purcell*, 436.
22. **Commercial Intercourse: Invitation to Enter Premises: Necessary Care.** One merchant dealing with another has a right to go upon the premises of the latter by virtue of the invitation implied from commercial intercourse, and the latter assumes to use ordinary care for the safety of his visitor. This degree of care is measured by the standard of the statutes as well as the common law. If some of the precautions prescribed by them are neglected, it is still incumbent upon the visitor to give ordinary care and attention to his own safety as affected by the conditions which lie openly before him, and this care is also measured by the law. *Ib.*
23. ———: ———: ———: **Case Adjudged.** Defendant occupied a store at the corner of two streets, with a main entrance from one street at the first floor, and another entrance from the other street leading into the basement of the building. The plaintiff, a business man of large experience and familiar with such establishments, called upon defendant at his store to negotiate an arrangement for the removal of certain leather in rolls belonging to plaintiff's firm which was in this store. Defendant consented to the arrangement and invited the plaintiff to go down into the basement where the leather was kept. Plaintiff, defendant and an employee went together, descending by an elevator. At the basement floor they alighted, leaving the elevator standing in the shaft. There were no lights in either the elevator or the basement, and the place was very dark. The entrance to the elevator shaft at this floor was provided with a double door, one-half of which was gone, so that there was an open space about two feet wide looking into the shaft and wholly unguarded. A city ordinance required this shaft to be guarded and the elevator to be lighted. When the party left the elevator, defendant opened the door leading to the side street and plaintiff then took his stand on the street in the daylight and received and counted the rolls of leather as they were brought out of the basement. Defendant left him thus engaged, went out through the side door, up the sidewalk, and around the corner of the building, a total distance of about fifty feet, to the main entrance to the first floor. Plaintiff remained at his work until it was completed, about an hour and a half, when he said to the employee, "Let's go up stairs," and without waiting for an answer walked out of the light into the basement and toward the elevator shaft where it was so dark that only a dim outline of the shaft could be seen, but he did see the two-foot opening out of which they had come when they descended. Without any invitation to enter or appearance to indicate that the elevator was still standing where they had left it an hour and a half before, he walked into the shaft and fell to the bottom, ten or twelve feet below. *Held*, that he could not recover for the consequent injuries. *Ib.*
24. **Contributory: Definition.** Contributory negligence rests on tort, and is the lack of that ordinary care on the part of a plaintiff which directly contributes to cause or causes his injury. *Harbacek v. Iron Works*, 479.

NEGLIGENCE—Continued.

25. **Assumption of Risk: Definition.** Assumption of risk is generally limited to the relation of master and servant, and rests upon contract either express or implied. It is a separate and distinct defense from contributory negligence, and is differently applied. *Ib.*

26. **Personal Injuries: Failure of Proof.** Where the specific act of negligence charged in the petition was that defendant failed to furnish plaintiff with goggles to protect his eyes while chipping iron with a cold chisel, and the proof was that plaintiff was an experienced workman, knew the use of goggles, saw other men about the premises at the same kind of work using goggles, had been told by the foreman that defendant had in the tool room everything that pertained to the job, had in fact for four months been getting his tools from that room, but had never asked for goggles, *held*, that the proof did not support the charge and the plaintiff was properly non-suited. *Ib.*

27. ———: **Assumption of Risk.** Where the plaintiffs' own evidence showed that the flying of chips or particles of iron from castings when excrescences were chipped off with a chisel was a usual and obvious risk incident to the business, and that plaintiff, an experienced workman, knew this and knew the danger to his eyes, *held*, that he assumed the risk when he entered and continued in the employment of the defendant, and could not recover damages for the loss of an eye. *Ib.*

28. **Personal Injuries: Street Car: City Ordinances: Humanitarian Doctrine.** In an action against a street car company for personal injuries suffered in a collision between one of the company's cars and plaintiff's wagon, it appeared that ordinances of the city in which the collision occurred provided that the driver of every car should keep a vigilant watch for all vehicles and persons at or near the track or moving towards it, and on the first appearance of danger should stop the car in the shortest time and space possible, and that every car should have a gong and the gong should be rung in quick succession on approaching any team, carriage or person. It also appeared that plaintiff, an aged man, was driving his wagon and horse slowly out of an alley into a street on which the car tracks were laid, and there was nothing to obstruct the view of the approaching car, though plaintiff testified that he did not see or hear it until it was upon him. The motorman testified that his car was going nine or ten miles an hour; that as soon as he saw plaintiff's horse and wagon he sounded the gong, but did not slacken his speed or sound the gong in quick succession until within eight or ten feet of where plaintiff's horse crossed the track, and that the horse was five or six feet beyond the track. The car hit the hind wheel of the wagon and threw plaintiff out. Plaintiff testified that the horse was at no time going at a speed exceeding a fast walk. Witnesses for plaintiff testified that they heard no gong sounded. *Held*, that this evidence presented a question for the jury as to whether the motorman sounded his gong in quick succession, kept a vigilant watch for the plaintiff, and stopped his car in the shortest time and space possible after the first appearance of danger, as required by the ordinance and the humanitarian doctrine. *Hale v. St. Joseph Ry. Co.*, 499.

29. **Car Company's Duty to be Vigilant.** The fact that plaintiff may have been guilty of negligence in driving on a street car track

NEGLIGENCE—Continued.

without looking, or looking carefully, for an approaching car, does not relieve the company of its duty under ordinances which require it to sound its gong, keep a vigilant watch and stop on the first appearance of danger to persons on the street approaching the track. *Hale v. St. Joseph Ry. Co.*, 499.

30. **Contributory: Humanitarian Doctrine.** The fact that plaintiff may have been guilty of contributory negligence in going upon a street car track does not take his case for damages from the jury; the humanitarian doctrine is based upon the idea that the plaintiff may be guilty of contributory negligence, and still may recover. *Ib.*
31. **Constitutional Law: City Ordinance Requiring Vigilance in Operating Street Cars.** It is well settled by the decisions of this court that city ordinances are valid which impose upon motormen operating street cars in the city the duty of keeping a vigilant watch for persons on the track or moving toward it, and of stopping the car on the first appearance of danger in the shortest time and space possible, and of ringing the gong in quick succession on approaching any team or person. *Ib.*
32. **Timely Warning: Awaiting Apparent Peril.** Under the vigilant watch ordinance in evidence the motorman cannot delay the sounding of his gong in quick succession until persons, teams or vehicles are actually going upon the track in front of his approaching street car or are in an actual position of danger; he must take affirmative action to give them timely warning of his approach. *Ib.*
33. **Instructions: Ordinances Regulating Management of Street Cars.** Where, in an action against a street car company to recover damages for personal injuries alleged to have been suffered through the negligence of the company's servants, it appears that there are controlling city ordinances regulating the management of the company's cars and imposing requirements looking to the safety of persons and property, instructions given which ignore these requirements are erroneous; and if such are given on behalf of the defendant, which authorize a verdict for defendant without requiring observance of these requirements, the fact that other instructions are given on the part of the plaintiff authorizing recovery by him if the requirements were violated does not cure the error. *Ib.*
34. **Pleading: Impossibility.** A charge in the petition that defendant's negligent act "caused a piece of metal to break off of said rail, said spike and said spike Maul," does not charge an impossibility. *Adams v. Ry. Co.*, 535.
35. **Expert: Striking Spike.** The matter of qualification of experts is largely within the discretion of the trial court, and it does not abuse its discretion in permitting a section-man, who has had eighteen months' experience as a trackman, to testify that the proper way to drive a spike is for the driver to be on the same side of the rail as the spike. Furthermore, where the witness corroborated the testimony of the two other conceded experts, his testimony at worst was harmless error. *Ib.*
36. **Instruction: Supported by Evidence: Proximate Cause.** The circumstantial evidence showed a small moon-shaped nick in the

NEGLIGENCE—Continued.

- rail, and three or four nicks in the iron maul, after the injury; that plaintiff heard a ringing sound, as if the maul had struck the rail, when the fellow-servant struck at the spike; that the spike was against the rail when it was struck; that concurrently with the blow some substance, hard and sharp, cut a gash in plaintiff's eye, so that the fluid therefrom immediately escaped into the plaintiff's hand. *Held*, that there was evidence that a piece of steel broke off of the spike, the rail or the maul, as charged in the petition, and such evidence was sufficient to support an instruction submitting that issue to the jury. *Ib*.
37. ———: ———: **Driving Spike.** And evidence that the proper way to drive a spike was for the "nipper" to put an iron bar under the tie and pry the tie up tight against the rail before any attempt to drive the spike was made, and for the driver and spike to be on the same side of the rail, and that he stood on the opposite side and struck the spike with the iron maul before the "nipper" had attempted to pry up the tie, is abundant evidence of the driver's negligence in driving the spike. *Ib*.
 38. **Assumption of Risk.** Under the Federal Employers' Liability Act, assumption of risk is a defense, which, to be available, must be pleaded by defendant. *Ib*.
 39. ———: ———: **Instruction: Established Method.** Where the instruction simply says that plaintiff did not assume the risk of any dangerous method of work employed by the driver of spikes in using his maul, unless plaintiff knew or could have known thereof by due care prior to his injury, a criticism that there is no evidence that defendants were negligent in establishing the method of doing the work lacks substance. *Ib*.
 40. ———: ———: ———: **Extraordinary Vigilance.** An instruction telling the jury that it was not the duty of the plaintiff "to maintain extraordinary vigilance to discover defects and dangers in the method of doing the work," where the work referred to is the work which defendants did through their servant at the time of plaintiff's injury, and not their method of doing such work generally, is not erroneous. Under no circumstances was plaintiff required to exercise more than ordinary care to anticipate said servant's negligent act in doing the work. *Ib*.
 41. **Argument to Jury: Discharge.** Remarks of counsel in their argument to the jury are not reversible error unless the rulings of the court thereon are excepted to at the time they are made, and unless such exceptions are saved the court does not err in refusing to discharge the jury. *Ib*.
 42. **Excessive Verdict: \$20,000.** Where the injury to a youth eighteen years of age consisted of the loss of one eye, and there is a lurking chance of the impairment of his other eye by reason of the injury sustained, a verdict of \$20,000 is too large by \$7,500. *Ib*.
 43. **Conflict of Opinions: Guarding Dangerous Machinery: Statute.** The Supreme Court has never construed Section 7828, Revised Statutes 1909 (Section 6786, Revised Statutes 1919) to mean that if the appliances provided to safely and securely guard dangerous machinery should, without any negligence of the master, suddenly get out of repair or fail to function then, in such case, there was a failure to comply with the statute. *State ex rel. Manker v. Ellison*, 647.

NEGLIGENCE—Continued.

44. **Excessive Verdict: Conflict of Opinion: Guarding Dangerous Machinery.** The Court of Appeals reversed a judgment for relator against his master for personal injuries sustained while working at a planing machine, which relator's petition alleged was operated without having any safe and secure covering, guard or protection to prevent workmen coming in contact with the rotating knives of said machine and which it was alleged the master carelessly and negligently failed to safely guard. The facts showed that a guard was provided which could be adjusted by a thumb-screw to any required height. For some unexplained reason this guard suddenly and unexpectedly failed to work when relator attempted to lower it and so he tightened the thumb-screw to hold it in place and proceeded to use the machine with it in that position. It was relator's duty to adjust the guard. While using the machine to plane a heavy board with the guard as stated his foot slipped on a loose piece of gas-pipe lying on the floor and covered with shavings and his arm and hand were thrown against the knives and he was injured. *Held*, the decision of the Court of Appeals was not in conflict with any decision of the Supreme Court. *State ex rel Manker v. Ellison*, 647.
45. **Pleading Generally: Res Ipsa Loquitur: Evidence of Specific Negligence.** The petition in a suit by a servant against his master, relator herein, for damages caused by the servant's hand being caught in a sausage making and meat-chopping machine, after describing the machine and the manner of operating it and of starting and stopping it, alleged that "said machine by reason of the negligence of the defendants was suddenly and without warning or notice to the plaintiff started and caused to revolve, and the wheels and cylinder and crusher and knives thereof to revolve and turn, whereby the plaintiff's right hand and thumb and fingers thereof were caught in said machine." Relator's motion to make more definite and certain and its demurrer, having been successively overruled and no exceptions saved, it filed answer and went to trial. On the trial, it objected to any evidence because the petition did not state a cause of action, which objection was overruled. In the Court of Appeals this objection was renewed on the ground that the petition was intended to be based upon the doctrine of *res ipsa loquitur* and lacked averments essential thereto. The Court of Appeals decided that, inasmuch as on the trial, the case, by proof and instructions, was submitted to the jury upon specific negligence within the allegations of the petition, the rule *res ipsa loquitur* was entirely removed from the case. *Held*, that this decision does not conflict with the prior rulings of the Supreme Court. *State ex rel. Packing Co. v. Reynolds*, 697.
46. ———: ———: **Failure to State Cause of Action: Objection at Trial.** Where a motion to make the petition more definite and certain is overruled and no exception saved and a demurrer to the petition is overruled and thereafter an answer is filed and the case goes to trial, a general objection by defendant to any evidence on the ground that the petition does not state a cause of action, must be treated as if such motion and demurrer had never been filed; and in such case the petition will be regarded as sufficient after judgment, if, after allowing all reasonable implications and intendments in its favor, there is a sufficient statement to apprise defendant with reasonable certainty of the character of the action and the issues to be met. The Court of Appeals having so decided, its decision is not in conflict with previous rulings of the Supreme Court. *Ib.*

NEGOTIABLE INSTRUMENTS.

1. **Fraud: Evidence.** Evidence which raises a doubt as to a note not being a safe investment because of the risk taken as to the solvency of the makers, must not be taken as equivalent to showing knowledge of fraud in the procurement of the note. Downs v. Horton, 414.
2. ———: **Indorsement Without Recourse.** The fact that the indorser of a note originally tainted with fraud took it indorsed without recourse, is not a badge of guilty knowledge of the fraud on the part of the indorsee. To hold otherwise would be to impair the negotiability of commercial paper. *Ib.*
3. **Proof of Fraud: The Jury.** Notwithstanding the jury are the judges of the credibility of testimony, yet, where in an action by an indorsee of a promissory note against the makers it is admitted that the note was originally tainted with fraud on the part of the payee from whom the indorsee obtained it, the latter may show by oral evidence that he had no notice of the fraud when he took the note, and the jury is not at liberty to disbelieve this evidence if it is uncontradicted, unimpeached and free from impeaching circumstances; and is not at liberty to find that the indorsee had actual knowledge of the infirmity, or of facts which made his taking of the note an act of bad faith within the meaning of Section 10026, Revised Statutes 1909, merely because there is a lack of what the jury deems credible evidence in support of the claim of the indorsee. *Ib.*
4. **What is Proof of Notice.** Under the Negotiable Instrument Act (R. S. 1909, sec. 10026) the duty is devolved upon the holder of a promissory note originating in fraud to prove his good faith and lack of notice of the fraud when he took the note; but in order to constitute notice there must be a finding that he had actual notice of the fraud, or of facts which made his taking of the note an act of bad faith. It is not enough that the facts in evidence raise a suspicion of guilty knowledge, or that the facts known to him would have put an ordinarily prudent man on inquiry. *Ib.*
5. **Statute a Codification of Former Law.** It is generally held that the Negotiable Instrument Law is a mere codification of the general law in relation to such instrument. This is certainly true of Section 10029, Revised Statutes 1909, which casts upon the holder the burden of proof of his good faith and lack of notice of the fraud when fraud has been shown in the procurement of the note sued on. *Ib.*
6. **Consideration.** The statute does not make want or failure of consideration unmixed with fraud one of the things proof of which will cast on the holder the burden of proving himself a holder in due course. *Ib.*
7. **Evidence of Notice of Fraud.** It is the law under this act, and was the law before the act was passed, that knowledge of facts which would excite suspicion or put a reasonable man on inquiry, or even negligence, is not sufficient to charge a purchaser of a note with notice of fraud in its origin. *Ib.*
8. **Evidence of Innocence.** Upon proof of fraud or illegality in the creation of a promissory note, an obligation is imposed on the holder to show that he came fairly into possession of it. Evidence

NEGOTIABLE INSTRUMENTS—Continued.

that it was taken for value before maturity will not alone meet the requirement. He must show that he had no knowledge or notice of the fraud. Specifically, he must disclose the facts and circumstances under which he acquired it. *Downs v. Horton*, 414.

9. **Evidence: The Jury.** When the indorsee of a negotiable instrument in an action on it against the makers, has shown that he purchased it for value before maturity in good faith, and has disclosed all the facts and circumstances attending the purchase, and they are all consistent with good faith and negative any notice of the fraud, and no damaging or discrediting circumstances of substantial value are shown, and defendant produces no counter-vailing or impeaching evidence, the jury may not, by disbelieving the plaintiff's evidence make a finding that after all the plaintiff did have actual knowledge of the fraud, and that there were facts known to him which made his act in taking the note bad faith on his part. *Ib.*
10. **Burden of Proof: Meaning.** The term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning, or at any subsequent stage of the trial in order to make or meet a prima-facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, sometimes called the "burden of evidence," passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets that obligation upon the whole case he fails. This burden of proof never shifts during the course of the trial. *Ib.*
11. ———: ———: **Distinction.** The phrase "burden to prove" used in the Negotiable Instrument Act, means the "burden of evidence," as distinguished from the "burden of proof" in its strict sense. *Ib.*
12. ———: **Order of Evidence: Directed Verdict.** In an action on a negotiable instrument, where fraud is charged by the answer, it is incumbent on the defendant to first offer evidence of facts tending to show the fraud and nothing more. This raises a presumption which calls upon the plaintiff to disclose the facts which are peculiarly within his knowledge. The plaintiff then gives evidence of all the facts and circumstances under which he acquired the paper, and the presumption takes flight. If the plaintiff's evidence is such that his good faith and want of notice are the only inferences that a fair-minded person could draw from it, it then devolves upon the defendant to prove specific facts tending to show plaintiff's actual knowledge of the fraud or his bad faith. If defendant offers no such evidence, then clearly he has failed to offer any evidence in support of his affirmative defense that plaintiff had notice of the fraud when he took the paper, and the plaintiff is entitled to a directed verdict. *Ib.*
13. **Negotiable Securities: Powers of Congress: Delegation of Power.** The Congress of the United States, having power under the Constitution to issue negotiable securities for governmental purposes,

NEGOTIABLE INSTRUMENTS—Continued.

has the further power of delegating to the Secretary of the Treasury the determination of the question whether or not such securities should be negotiable, as in the case of the *interim* certificates issued during the World War for bonds not yet ready for delivery. *Natl. Bank v. People's Bank*, 464.

14. ———: **Liberty Loans: Interim Certificates.** The Act of Congress of April 24, 1917, providing for the issue of Liberty Bonds, gave the Secretary of the Treasury power to issue *interim* certificates to be held until the bonds could be prepared, and also to make them negotiable. *Ib.*
15. ———: **Form and Terms: According to Common Law and State Statutes.** The power of the United States to make its securities negotiable is not subject to any rules of common law or state statute in respect to form or terms. *Ib.*
16. ———: **Negotiable in Form.** Every *interim* certificate issued under the Liberty Loan Act of Congress of 1917 provided that "upon surrender of this *interim* certificate, the bearer hereof will be entitled to receive, when prepared, definitive bonds in the amount of —dollars, bearing interest from June 15, 1917. This certificate and all rights under and by virtue hereof shall pass by delivery. There must be no writing on this certificate until it is presented for exchange for bonds." *Held*, that these certificates were clearly intended to be and are negotiable instruments. *Ib.*
17. ———: **Theft of Interim Certificates: Bona-Fide Purchasers.** Certain negotiable *interim* certificates of the United States were stolen from a bank in Missouri, and were shortly afterward acquired by a bank in Oklahoma in the ordinary course of business from two of its customers who resided and did business in its home town, without notice of or reason to suspect any defect in their title, and for their full face value. The Oklahoma bank was at the same time buying from other persons on the same terms. *Held*, that it was a bona-fide purchaser for value, and had the title as against the Missouri bank. *Ib.*

NEW MADRID COUNTY. See **Counties**.

OVERCHARGES OF FREIGHT RATES. See **Railroads**.

PAROL CONTRACT FOR PURCHASE OF LAND. See **Specific Performance**.

PARTIES TO ACTION.

1. **Railroad and Director General: Substitution.** Whether or not a railroad company could be sued for damages after the promulgation of Order No. 50 of the Director General of Railroads, and where suit was brought against the railroad company and William G. McAdoo whether Walker D. Hines should have been substituted as defendant, are purely academic questions in view of the Transportation Act of 1920, which authorized the substitution of the agent designated by the President in lieu of both the railroad company and the Director General. *Adams v. Ry. Co.*, 535.
2. ———: **Substituted by Body of Petition.** Where the answer, although entitled, "Answer of William G. McAdoo, Director General of Railroads," purports in its body to be the answer of the Director

PARTIES TO ACTIONS—Continued.

General of Railroads, without naming him, "now in possession of said railroad," and the record shows that the attorney for Hines defended the case, it will be held that said Hines was substituted for McAdoo. *Adams v. Ry. Co.* 535.

3. **Railroad and Director General: Order No. 50.** After the promulgation of Order No. 50 by the Director General of Railroads on October 28, 1918, the railroad company, joined with him as defendant, was no longer subject to suit for personal injuries arising during Federal control, whether happening after or before the date of said order. *Ib.*
4. ———: **Misjoinder.** Where the railroad company and the Director General of Railroads were joined as defendants, the erroneous judgment against the railroad company does not affect the validity of the judgment against the Director General. *Ib.*

PEMISCOT COUNTY. See *Counties*.

PERFORMANCE. See *Specific Performance*.

PERJURY.

1. **Indictment: Materiality of Question.** At common law, a general allegation in an indictment for perjury that the question asked the witness in an investigation before a grand jury was material was insufficient, but it was necessary that it state facts showing its materiality; but under the statute (Sec. 3132, R. S. 1919) such general allegation is sufficient, and it is only necessary to allege that the matter or testimony alleged to be false was material to a certain matter or issue named, without setting forth the particular facts showing its materiality. *State v. Ruddy*, 52.
2. ———: **Explicit Charge: Statute of Jeofails.** Where the question asked of Ruddy by the grand jury was, "Have you been in the home of Jim Benvenuto and Sadie Benvenuto within the last twelve months?" an indictment charging that "whereas, the said grand jurors charge that in truth and in fact the said Mike Ruddy had been frequently in the said house in which the said Jim Benvenuto and Sadie Benvenuto had lived for the past twelve months" and that "the said Mike Ruddy at the time of giving said testimony well knew that on several occasions within the last twelve months he had gone into the said house in which said Jim and Sadie Benvenuto were then and there so living," while it does not specifically allege that Ruddy had been in the house of the Benvenettos, but only in the house in which they lived, and does not positively allege that he had been in the house where they lived, but only knew he had been there, is sufficient under and its defects are cured by the Statute of Jeofails (Sec. 3908, R. S. 1919), which declares that no indictment shall be deemed invalid for omissions or irregularities "for want of an allegation of the time or place of any material fact, when the time and place have once been stated," nor "for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant." The indictment does fail to contain an allegation of "the time or place of a material fact," and it has a "defect or imperfection" similar in character to such omission, and these defects are cured by the statute. So also had "the time and place once been stated in the indictment" in this case. *Ib.*

PERJURY—Continued.

3. **Evidence: Materiality.** Where the grand jury was inquiring whether intoxicating liquors had been unlawfully sold at the house of Jim and Sadie Benvenuto, a question asked of Ruddy whether he had been in said house within the last year was material, and a false answer constituted perjury. A case may be built up step by step, and one of the steps in making out the case of unlawful sale of intoxicating liquor at said house was to show that the witness visited the place where the liquor was being sold, and if he denied being there it was useless to ask him if he saw the sale of it. *Ib.*

PLEADING.

1. **General and Specific Injuries: Resultant Damages: Natural and Necessary.** When the petition alleges special damages in a personal injury case, the proof must be limited to the special damages pleaded. Where a specific result necessarily follows from an alleged injury it is not necessary to plead it, but where it is the natural but not the necessary result of the injury it must be pleaded in order to admit evidence of it. Also if an allegation of damage contains a general term in describing what follows the injury, then any result coming within the content of that term may be proved without specific allegation; and if the petition contains any allegation of a general nature which may be said to embrace within the general term a resultant damage sought to be proven, and defendant is not satisfied with the general allegation, he should move to make more specific. *Mayne v. K. C. Rys. Co., 235.*
2. ———: ———: ———: **Injury to Pelvic Cavity: Impaired Functions: Child Birth.** Where the petition alleges that the bones surrounding the pelvic cavity were broken and crushed, and the organs within the cavity were crushed, and after describing the broken condition of the bones and the dislocation and rupture of the ligaments alleges that "the functions of all of which organs have been seriously and permanently impaired," it contains an allegation of an injury in such general terms as to authorize proof of plaintiff's inability to give birth to a child, since one of the functions of the organs so impaired was child-bearing, and inability to bear children is a necessary result of a permanent impairment of those organs. *Ib.*
3. **Negligence: Impossibility.** A charge in the petition that defendants negligent act "caused a piece of metal to break off of said rail, said spike and said spike maul," does not charge an impossibility. *Adams v. Ry. Co., 535.*
4. ———: **Assumption of Risk.** Under the Federal Employers' Liability Act assumption of risk is a defense, which, to be available, must be pleaded by defendant. *Ib.*
5. **Negligence: Pleading Generally: Res Ipsa Loquitur: Evidence of Specific Negligence.** The petition in a suit by a servant against his master, relator herein, for damages caused by the servant's hand being caught in a sausage-making and meat-chopping machine, after describing the machine and the manner of operating it and of starting and stopping it, alleged that "said machine by reason of the negligence of the defendants was suddenly and without warning or notice to the plaintiff started and caused to re-

PLEADING—Continued.

volve, and the wheels and cylinder and crusher and knives thereof to revolve and turn, whereby the plaintiff's right hand and thumb and fingers thereof were caught in said machine." Relator's motion to make more definite and certain and its demurrer, having been successively overruled and no exceptions saved, it filed answer and went to trial. On the trial, it objected to any evidence because the petition did not state a cause of action, which objection was overruled. In the Court of Appeals this objection was renewed on the ground that the petition was intended to be based upon the doctrine of *res ipsa loquitur* and lacked averments essential thereto. The Court of Appeals decided that, inasmuch as on the trial, the case, by proof and instructions, was submitted to the jury upon specific negligence within the allegations of the petition, the rule *res ipsa loquitur* was entirely removed from the case. *Held*, that this decision does not conflict with the prior rulings of the Supreme Court. *State ex rel. Packing Co. v. Reynolds*, 697.

6. **Negligence: Pleading Generally: Failure to State Cause of Action: Objection at Trial.** Where a motion to make the petition more definite and certain is overruled and no exception saved and a demurrer to the petition is overruled and thereafter an answer is filed and the case goes to trial, a general objection by defendant to any evidence on the ground that the petition does not state a cause of action, must be treated as if such motion and demurrer had never been filed; and in such case the petition will be regarded as sufficient after judgment, if, after allowing all reasonable implications and intendments in its favor, there is a sufficient statement to apprise defendant with reasonable certainty of the character of the action and the issues to be met. The Court of Appeals having so decided, its decision is not in conflict with previous rulings of the Supreme Court. *Ib.*

POWERS OF CONGRESS. See *Negotiable Instruments*, 13 to 17.

PRACTICE.

1. **Opening Statement.** It is not incompetent for the prosecuting attorney to mention any fact in his opening statement which he can prove and it is competent for him to prove. It was not improper for the prosecuting attorney in his opening statement to state that defendant had attempted to spirit away the prosecutrix, since it was proper to prove that fact and there was evidence tending to prove it. *State v. Howe*, 1.
2. **Appellate Practice: Verdict for Right Party: Decision on Point Not Raised by Instructions.** Plaintiff sued for curtesy consummate in his wife's lands conveyed by her alone in her lifetime. The answer was a general denial, and the verdict was for defendants. The court granted a new trial on the ground that the verdict was "unsupported by any evidence," and the defendants appeal. Both plaintiff and defendants tried the case on the theory that if plaintiff and the sole grantor in the deed were husband and wife, that issue was born alive of the marriage, that she was seized of the premises during coverture and died before suit was brought, and that defendants were then in possession, plaintiff was entitled to recover. Plaintiff's instructions were framed on this theory, and defendants filed no demurrer and the only instructions asked by them were given, and these related only to the

PRACTICE—Continued.

burden resting upon plaintiff to prove the birth of living issue and the other issues of fact set out in plaintiff's petition. *Held*, that, notwithstanding court and counsel were mistaken as to the law of the case, in that their theory was that the husband, not having joined in his wife's deed, had a curtesy estate in the land, yet, the verdict being for the right party in view of the facts and the law, the order granting a new trial will be reversed, and the cause remanded with directions to set it aside and to reinstate the judgment. *Brook v. Barker*, 13.

3. **Order of Evidence: Directed Verdict.** In an action on a negotiable instrument, where fraud is charged by the answer, it is incumbent on the defendant to first offer evidence of facts tending to show the fraud and nothing more. This raises a presumption which calls upon the plaintiff to disclose the facts which are peculiarly within his knowledge. The plaintiff then gives evidence of all the facts and circumstances under which he acquired the paper, and the presumption takes flight. If the plaintiff's evidence is such that his good faith and want of notice are the only inferences that a fair-minded person could draw from it, it then devolves upon the defendant to prove specific facts tending to show plaintiff's actual knowledge of the fraud or his bad faith. If defendant offers no such evidence, then clearly he has failed to offer any evidence in support of his affirmative defense that plaintiff had notice of the fraud when he took the paper, and the plaintiff is entitled to a directed verdict. *Downs v. Horton*, 414.

PRINCIPAL AND AGENT.

1. **Presumption Arising from Ownership: Question for Jury.** Where a plaintiff was injured by an auto-truck in use for the delivery of beer and soda water, and there was no question that the driver was in the course of employment, and the real question at issue was whether the relationship of agency or master and servant existed between the driver and a brewery company, and the Court of Appeals in its opinion says the evidence tended to show that a certain firm was conducting the business of distributing beer on commission, and hired the driver in that business; that the truck was owned by the brewery company; that it had been substituted by it for horse-drawn trucks; that it caused its own name to be printed upon it; that no charge was made against the firm for its use; that repair bills were paid by the brewing company; that it paid the rent on the building occupied by the firm, and maintained at its own expense the refrigerating plant for cooling beer; that it fixed the sale price of beer; that containers, when empty, were returned to the Company at its expense; that the firm acted for it in collecting notes and rents and buying saloon buildings for the company; that the company carried insurance on the truck and had previously settled a claim for damages arising out of an accident in which the truck had a part, and then rules that such evidence was sufficient to carry the case to the jury on the question whether the driver was the agent of the brewery company in delivering the beer, and further rules that said issue does not rest upon any mere presumption arising out of the ownership of the truck, but upon direct testimony concerning the relations between the company and the firm, and also upon inferences of fact which the jury were entitled to draw from the evidence, its said rulings do not conflict with prior decisions of the Supreme Court. *Ex parte Brew. Co. v. Ellison*, 139.

PRINCIPAL AND AGENT—Continued.

2. ———: **Testimony of Agent.** The testimony of the agent of the company at the time the policy was issued, tending to show that it was not really delivered to the insured and was not paid for, is competent, although the insured is dead. [Following *Wagner v. Binder*, 187 S. W. 1128, and *Allen v. Jessup*, 192 S. W. 720.] *Lafferty v. Casualty Co.*, 555.
3. ———: **Payment of Premium by Volunteer: Hearsay.** Testimony of persons in whose employ the insured was or with whom he was connected in business, showing that at the time they paid the premium on the policy they knew or had been informed that the insured had been killed in a distant town, is not hearsay, but is binding on the plaintiff for the reason that their act in paying the premium, though made of their own motion and voluntarily, was her act, where she seeks to avail herself of the benefit of said act. *Ib.*

PROCESS. See **Summons.**

PROSTITUTION.

1. **Receiving Money of Prostitutes: Act of 1913.** Section 3 of the Act of 1913, Laws 1913, page 220 (the Missouri "White Slave" Act) does not distinguish between the character of persons, to whom it is intended to apply, but is broad enough to embrace all persons who knowingly accept money earned by a woman by acts of prostitution, without consideration, regardless of the manner in which it is received, whether they be procurers, or men engaged in illicit traffic with women, or a woman who keeps a bawdy house and requires another woman therein to divide with her the proceeds of her earnings while engaged in prostitution. *State v. Howe*, 1.
2. ———: **Earned by Illicit Sexual Intercourse.** An instruction telling the jury that if defendant did knowingly, unlawfully and feloniously accept, receive or appropriate to her own use any amount of unlawful money made by the earnings of a certain woman "by engaging in prostitution, that is, by having illicit sexual intercourse with men," etc., includes words not in the statute, and by the use of the word "illicit" might require the jury to find that the prostitution of the woman was criminal; but their inclusion is an error of which the defendant cannot complain, because these words placed upon the State a greater burden than the statute does, and requires the jury to find a fact which the statute does not make an element of the offense. The statute only requires the jury to find that the money received by defendant was earnings received by a woman engaged in prostitution; and if the money was so earned, and defendant knowingly received it, without other consideration, she is guilty under the statute, although the conduct of the prostitute may not have been violative of the criminal law. *Ib.*
3. ———: **Evidence: Physician's Receipt.** A physician's receipt showing that defendant had paid a bill for the prosecutrix, offered for the purpose of accounting for the absorption by the defendant of the prosecutrix's money, is a mere statement of a third person not a party to the suit, without opportunity of cross-examination, and is therefore pure hearsay, and is properly excluded. *Ib.*

PUBLIC SERVICE COMMISSION.

1. **Public Utility: Compulsory Service: Unelected Territory.** The Public Service Commission has no power to make an order compelling an electric light company to furnish electricity to a town which is not a part of the territory it has undertaken to serve. Such compulsory service would be tantamount to an appropriation of the company's property to a public service to which it has not been dedicated, and would amount to the taking of private property for a public use without just compensation. But on the other hand, if the town is territory comprehended within the company's profession of service it may be required to serve it, because it is its duty, within reasonable limitations, to serve all in such territory who apply. State ex rel. Power Co. v. Public Serv. Comm., 522.
2. ———: ———: ———: **Question of Fact.** Whether or not an electrical company has undertaken to supply electricity to a certain territory is a question of fact to be determined by the evidence before the Public Service Commission, and will be determined by the Supreme Court, on review, unhampered by the findings of either the Commission or the circuit court; and where there is no express declaration of the territorial limits of its service, the fact may be determined by its charter and what it has done thereunder. Ib.
3. ———: ———: ———: **Charter Provisions.** The charter of a public service company empowering it "to generate, distribute and sell electric energy in Missouri and elsewhere, and to do all things incident thereto" is merely permissive, and does not require it, upon demand, to distribute and sell electricity everywhere in Missouri, nor can it be reasonably inferred that by accepting such charter power it undertook to furnish service in all parts of the State. But where, upon receiving such charter, it proceeded to localize the territory in which it proposed to operate, and applied for and received a franchise permitting it to erect poles for the suspension of electric light and power wires on and along the public roads and highways of Newton County, and obtained pole-line rights-of-way in Jasper, Lawrence, Christian, Greene and Taney counties, applicable to all highways alike, it will be held that it obtained franchises that covered all the highways in said counties, including the streets and thoroughfares of the town of Diamond, in Newton County, and that it undertook to serve, in some form, the inhabitants of said town with electricity, upon terms that are reasonable and fair. Ib.
4. ———: ———: ———: **Precise Service: Shown by Acts.** Where the public service company constructed a water-power plant for generating electricity in Taney County; built a transmission line from it northerly through Newton County to Joplin; erected a sub-station a mile east of Diamond, and from thence built additional lines extending to Granby and Neosho in Newton County; put in distribution systems at Granby and at Pierce City in Lawrence County; then began the operation of its plant and the distribution and sale of electric current; at Joplin and Neosho, sold and delivered electricity at wholesale to another electric company; at Granby and Pierce City, distributed and sold the current directly to consumers, it marked out for itself the precise service undertaken within the selected territory, and the inference from these constructions and operations necessarily is that it had undertaken not only to furnish electricity to the public at wholesale, but to distribute and sell it to the inhabitants of the town

PUBLIC SERVICE COMMISSION—Continued.

and other populous centers in the selected district, including the town of Diamond. And the inference that Diamond was a community it had professed to serve is further enforced by the fact that its agent went there to ascertain how many of its residents would use the service. *State ex rel. Power Co. v. Public Serv. Comm.*, 522.

5. **Public Utility: Compulsory Service: Reasonableness.** An electrical company is not required to furnish electricity to every village and hamlet within the boundaries of its professed service, unless such requirement is reasonable; and the reasonableness of an order of the Public Service Commission requiring it to serve a certain town depends on whether it is arbitrary, capricious or unlawful. And where the facts demonstrate that the order is neither arbitrary nor capricious, it can be held to be unlawful only on the ground that it will operate to take the company's property for a public use without just compensation. *Ib.*
6. ———: ———: ———: **Unlawful: Just Compensation.** Where the order of the Public Service Commission requiring an electrical company to distribute and sell electricity to the inhabitants of a certain town does not appropriate such property to a public use to which the company has not already dedicated it, and the evidence shows that furnishing the service will not entail even a present financial loss, and that the gross revenue will be sufficient to cover depreciation and the cost of operation and to insure an adequate return on the investment, the order cannot be held to operate to take the company's property for a private use without just compensation, but is a reasonable and lawful one. *Ib.*
7. ———: ———: **Choosing Towns Within Selected Territory.** Where the effect of its occupying a selected territory by a public service corporation is to exclude therefrom other public service utilities and to leave unserved the communities therein it does not choose to serve, it will not be permitted to pick and choose and serve only the portion of the territory covered by its franchise which is presently profitable to it. *Ib.*

PUBLIC UTILITY. See **Corporations.**

QUIETING TITLE.

Jurisdiction. The Circuit Court of Pemiscot County, in a suit to ascertain and determine title, having determined that the lands were in New Madrid County, had no jurisdiction to adjudge "that the plaintiff has no right, title, claim or interest in and to said lands. *Alluvial Realty Co. v. Lbr. Co.*, 299.

RAILROADS.

1. **Freight Rates: Overcharges: As Between Agent and Consignee.** Where the purchaser bore the burden of transportation and paid all the freight charges on railroad ties bought by his agent on commission, as between them he, and not such agent, is entitled to all overcharges made by the railroad. *Cobb v. Joyce-Watkins Co.*, 39.
2. ———: ———: **As Between Vendor and Purchaser.** Where the price of the railroad ties to the vendors was the price at the station of destination less the freight charges from the loading station to said destination, and the vendors were paid that price,

RAILROADS—Continued.

the freight charges being paid by the consignee, such vendors are not entitled to recover the excess in the overcharge of freight rates made by the railroad. *Ib.*

3. ———: ———: ———: **F. O. B. Destination.** The term "f. o. b. St. Louis," if used at all in the contract for the sale of railroad ties in this case, was not used in its ordinary commercial sense; but the uniform manner of delivery, inspection, acceptance and payment of the purchase price, the assumption of the trouble and expense, by the agent of the purchaser, of ordering cars, loading the ties and paying the freight, and the fact that the vendors had no further interest or concern in the ties or their transportation after they were placed in the loading station yard, inspected and accepted, rebut the implication that the term "f. o. b. St. Louis" was understood as implying that the freight charges should be at the cost of such vendors, and on that term no judgment that they were, as between them and said purchaser, entitled to the excess of the overcharges made by the railroad company can be based. *Ib.*
4. ———: ———: ———: **Bill of Sale: Proof.** Bills of sale, executed by the seller of railroad ties, in which is set forth the name of the buyer, the number of ties sold, the price, the date and number of car by which shipped, and nothing more, while not required by law, the sales and deliveries being complete without them, and the acceptance in payment of drafts from the purchaser which recite that they are given for the purchase price and in settlement of said bills, in the absence of fraud or imposition, characterize the transaction, and furnish indubitable proof that the sellers were not chargeable with the freight charges, and are not entitled, as between them and the said purchaser, to the excess of overcharges in the freight rates made by the railroad and paid by said purchaser. *Ib.*
5. ———: ———: ———: **Agreed Freight Rate.** Where the seller and purchaser agreed on the price of ties at the station of destination, basing the price on a certain freight rate, if the rate was lower than that rate the seller to have the benefit of it, and if higher he was to stand it, and settlement was made on that basis, the seller is entitled to the excess of overcharges in the freight rate made by the railroad company. *Ib.*
6. **Brakemen: Authority to Eject Trespassers.** In this case there was sufficient evidence to enable the jury to determine whether or not the brakemen on defendant's moving freight train were authorized, while acting in the line of their duty, to eject trespassers from the train. *Jones v. Frisco Ry. Co.*, 64.
7. **Negligence: Res Ipsa Loquitur: Passenger.** In determining whether the doctrine of *res ipsa loquitur* applies to a case, it does not matter whether the injured party was a passenger on defendant's street car which injured her. *Mayne v. K. C. Rys. Co.*, 235.
8. ———: ———: **When Applicable: Case for Plaintiff.** When the instrumentality which causes an injury is within the control of and operated by defendant, and moves or is operated in such a way that such motion or operation would not have happened except for some defect or negligent act, and injury results, the doctrine

RAILROADS—Continued.

of *res ipsa loquitur* applies, and a plaintiff suing for an injury so caused has only to show control of the instrumentality by the defendant and its usual movements. It is then for defendant to explain, if it can, the casualty, so as to exclude negligence on its part. *Mayne v. K. C. Ry. Co.*, 235.

9. **Negligence: Res Ipsa Loquitur: Passenger: Erratic Street Car.** As a street car was being backed, the hind wheels went as they were intended to go and the front wheels veered off by reason of a split switch and caused the front end of the car to swing around and strike plaintiff standing on a sidewalk, the movement being one that could not have happened except for some defect in the car or track or some negligence in its management, and the machinery and all the appliances being peculiarly within the knowledge of defendant. *Held*, that the defendant was charged with the burden of explaining the casualty; and if by its testimony it only showed that the track, the car and the wheels were in good condition, but made no showing of what caused the split switch and the consequent erratic movement of the car, an instruction authorizing a recovery by plaintiff, if technically incorrect because it made reference to plaintiff as a passenger, is not reversible error. *Ib.*
10. **Consolidation: Assumption of Debt.** Where one corporation was merged into another by consolidation, the merged company transferring to the other all its property except its franchise to be a corporation and going entirely out of business, and the other assuming to pay all its debts, in an action against the surviving corporation to recover for services rendered in relation to the affairs of the merged corporation, if the only evidence of the value of the services covers the entire period, and nothing shows separately the value of those rendered before the consolidation, there is no basis for an instruction authorizing recovery; the assumptions of debt did not cover the after-rendered services. *Seelig v. M., K. & T. Ry. Co.*, 343.
11. **Parties: Railroad and Director General: Substitution.** Whether or not a railroad company could be sued for damages after the promulgation of Order No. 50 of the Director General of Railroads, and where suit was brought against the railroad company and William G. McAdoo whether Walker D. Hines should have been substituted as defendant, are purely academic questions in view of the Transportation Act of 1920, which authorized the substitution of the agent designated by the President in lieu of both the railroad company and the Director General. *Adams v. Ry. Co.*, 535.
12. ———: ———: **Substituted by Body of Petition.** Where the answer, although entitled, "Answer of William G. McAdoo, Director General of Railroads," purports in its body to be the answer of the Director General of Railroads, without naming him, "now in possession of said railroad," and the record shows that the attorney for Hines defended the case, it will be held that said Hines was substituted for McAdoo. *Ib.*
13. ———: ———: **Order No. 50.** After the promulgation of Order No. 50 by the Director General of Railroads on October 28, 1918, the railroad company, joined with him as defendant, was no longer subject to suit for personal injuries arising during Federal control, whether happening after or before the date of said order. *Ib.*

RAILROADS—Continued.

14. ———: ———: **Misjoinder.** Where the railroad company and the Director General of Railroads were joined as defendants, the erroneous judgment against the railroad company does not affect the validity of the judgment against the Director General. *Ib.*

REASONABLENESS OF PUBLIC SERVICE. See **Corporations.**

RENUNCIATION OF WILL. See **Wills.**

SALES.

1. **Statute of Frauds: Oral Contract of Sale: When Valid.** In an action to recover the balance due on an oral contract for goods sold and actually delivered, amounting to \$947.50, the fact that the contract was not by its terms to be performed within one year is no defense. *Schlitz Brew. Co. v. Poultry-Game Co.*, 400.
2. **Executed Contract: Mutuality.** Where a contract for the delivery of beer, while it prescribed the terms of payment by the purchaser and set forth many other details, did not obligate the brewer to make deliveries, but he did in fact, for a series of years, make such deliveries, in large quantities. *Held*, that, in an action by the brewer to recover a balance for the beer delivered, want of mutuality was not admissible as a defense; the shipments and acceptance supplied the consideration to support the contract. *Ib.*
3. **Sale of Goods: Bond: Case Adjudged.** In the year 1905, a corporation organized for the purpose of dealing in dressed poultry, game and country produce, executed a bond with sureties which recited that it had agreed to purchase beer from a brewing company for a period of ten years, and to sell this company's beer to the exclusion of all other malt beverages, and that the brewing company consented to sell and ship beer to the Poultry & Game Company, from time to time, as needed in its business, at prices agreed upon; that the Brewing Company reserved the right to change any or all of the prices from time to time, without notice to the purchaser or its sureties; and that it also reserved the right to terminate the agreement to sell beer at any time without notice. The bond further recited that the Brewing Company had agreed to extend to the purchaser a standing credit of \$10,000. The Brewing Company did not sign this bond or the contract recited in it, but did for a period of six years furnish beer in large amounts, as ordered. *Held*, first, that the contract, not being expressly prohibited by law, and not being *malum in se*, or contrary to public policy at the time it was made, was enforceable against the Poultry & Game Company and its sureties, although not signed by the Brewing Company; *second*, the fact that the contract was not to be wholly performed within one year was no defense; and *third*, the contract was not void for want of mutuality, the Poultry & Game Company having accepted the beer. *Ib.*

SCHOOLS.

1. **Negligence: Board of Education: Liability.** On the ground of its legal character alone as a quasi-corporation, the Board of Education of the City of St. Louis is not answerable in damages for negligence in the matter of keeping school grounds in a reasonably safe condition for pedestrians. *Cochran v. Wilson*, 210.

SCHOOLS—Continued.

2. **Negligence: Board of Education: Liability: Governmental Function.** In the exercise of the duty conferred upon it by statute of erecting and maintaining public schools for the education of children, a school district, and especially the Board of Education of the City of St. Louis, performs a public or governmental power, and not a special corporate or administrative duty, and is not liable in damages for the negligent acts of its officers or agents in maintaining or repairing school buildings or grounds. *Cochran v. Wilson*, 210.
3. ———: ———: ———: **Trust Funds.** School funds are collected from the public to be held in trust by boards of education for the specific purpose of education, and an attempt to otherwise apply them is without legislative sanction and finds no favor with the courts. Such funds are similar to the funds of a charitable hospital, which, being devoted to a specific purpose, cannot be diverted or absorbed by claims arising from the negligence of its trustees or employees. *Ib.*

SERVICE. See **Summons**.

SEWERS. See **Cities**, 32 to 34.

SPECIFIC PERFORMANCE.

1. **Purchase of Land: Oral Contract.** The Statute of Frauds is an insuperable barrier to the enforcement of an oral contract for the purchase of land, unless the proof of such contract is so clear, cogent and convincing as to leave no reasonable doubt in the mind of the chancellor as to its terms and conditions; and where part performance is relied upon to take the case out from under the operation of the statute, there must be like proof that the acts performed refer to the contract and would not have been done unless on account of and in pursuance to it and with a direct view to its performance. *Scheerer v. Scheerer*, 92.
2. ———: ———: **Part Performance: Possession.** Taking and continuing in possession by the vendee under an oral contract for the purchase of land, with the vendor's consent, the payment of a substantial part or all of the purchase price, and the making of substantial improvements, are acts of performance when referable solely and unequivocally to the contract. The taking of possession alone is not generally recognized as sufficient part performance, but taking possession, followed by the further act of part payment, or the making of improvements, is sufficient to validate the parol contract. *Ib.*
3. ———: ———: ———: **Signing Deed.** Where the vendee made substantial part payment, went into possession, made valuable improvements, and afterwards made other substantial part payments, all referable solely to the parol contract of purchase, and a receipt for a large payment was given with the vendor's name attached thereto, and his testimony as to whether he signed the receipt is evasive, and he signed a deed in exact harmony with and in pursuance to the parol agreement, which he refused to deliver and accept a deed of trust for the balance, the evidence showing that a desire to avoid taxes being controlling, the contract will be specifically enforced, there being no other rational hypothesis on which the signing of the deed can be explained. *Ib.*

SPECIFIC PERFORMANCE—Continued.

4. ———: ———: **Indefinite Terms: Cured by Interpretation.** An objection that the parol contract pleaded is indefinite as to the payments to be made by the vendee before the vendor would make a deed, is cured by an allegation and proof that on the making of certain payments the vendor agreed to make a deed, which he did sign but did not deliver, for this was an interpretation of the contract which made it definite. Ib.
5. ———: ———: **Time of Payment: Interest as Compensation for Delay.** Where the time of payment of the purchase price of land was optional with the vendee, as it suited his convenience, the law implies a reasonable time; and where the vendor accepted a second payment five years after the sale, time was not of the essence of the contract. And ordinarily, where the time of payment of the purchase is optional with the vendee, the payment of interest on the deferred payments will be sufficient compensation for the delay. Ib.
6. ———: ———: **Homestead: Wife's Consent.** Where the land the vendor orally agreed to sell was his homestead, enforcement will not be denied on the ground that he could not sell it without the concurrence of his wife, where he sold it with the intention of abandoning it, acquired another homestead which he still occupies, accepted payments on the purchase price years after the sale, and permitted the vendee to remain in possession, exercising acts of ownership, for fifteen years. Ib.
7. ———: ———: **Wife's Inchoate Dower.** The wife not being a party to the parol contract for the sale of land or to the suit to specifically enforce, although it is clear that it was mutually understood that the vendee was to have a deed executed by both the vendor and his wife, and the vendee being entitled to a decree of specific performance, the purchase price should be diminished by the value of the wife's inchoate dower, unless she will join the vendor in the execution of a deed. Ib.

STATE AUDITOR. See **Cities.**

STATUTE OF FRAUDS. See **Contracts, 7 to 11.**

STATUTE OF JEOPARDIES. See **Indictment and Information.**

STATUTES AND STATUTORY CONSTRUCTION.

1. **Prostitution: Receiving Money of Prostitutes: Act of 1913.** Section 3 of the Act of 1913, Laws 1913, page 220 (the Missouri "White Slave" Act) does not distinguish between the character of persons to whom it is intended to apply, but is broad enough to embrace all persons who knowingly accept money earned by a woman by acts of prostitution, without consideration, regardless of the manner in which it is received, whether they be procurers, or men engaged in illicit traffic with women, or a woman who keeps a bawdy house and requires another woman therein to divide with her the proceeds of her earnings while engaged in prostitution. *State v. Howe, 1.*
2. **Abortion: Gravamen: Intent.** The production of an abortion is not the offense denounced by the statute (Sec. 4458, R. S. 1909), but the intent to produce a miscarriage or abortion, where the act is not a medical necessity. The intent constitutes the grava-

STATUTES AND STATUTORY CONSTRUCTION—Continued.

men of the offense, and the evidence must establish such unlawful intent. *State v. Keller*, 124.

3. **Life Insurance: Misrepresentations as Defense: Tender of Premiums.** Section 6401, Revised Statutes 1919, found in the article relating to fraternal beneficiary associations and declaring that "such societies shall be governed by this article and shall be exempt from all provisions of the insurance laws of this State, not only in governmental relations with the State, but for every other purpose," exempts such associations from the requirements of Section 6940, found in the general insurance law and declaring that in suits brought upon life policies "no defense based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court for the benefit of the plaintiff the premiums received on such policies." The beneficiary association, when sued by a certificate holder for physical disabilities, can interpose the defense of misrepresentations on his part in obtaining the policy, without having returned or tendered the premiums received. *State ex rel. American Yeomen v. Reynolds*, 169.
4. **Conflicting Statutes: Resurfacing and Reconstruction of Streets: Later Enactment: Remonstrance.** Although the Act of 1919 conflicts with Sections 9254 and 9255 of the Act of 1911. Laws 1911, pages 337-341, since the two acts provide for an entirely different method of procedure as to the paving and re-surfacing of streets, and in that respect are inconsistent and both cannot operate together, yet the Act of 1919, being a later enactment, necessarily repeals the Act of 1911, and proceedings for resurfacing a street based on the Act of 1919 are not invalid because of said conflict, notwithstanding the Act of 1911 makes provision whereby resident owners may protest against any proposed paving, while the Act of 1919 contains no such provision. *Asel v. City of Jefferson*, 195.
5. **Sale of Non-Resident Minor's Real Estate: For Re-investment.** Section 411, Revised Statutes 1919 (Sec. 49, R. S. 1855), says that "when a non-resident minor, owning real estate in this State has a guardian in the state or territory in which he resides, the probate court in the proper county may authorize his guardian to sell such real estate and receive the proceeds thereof;" and that and the preceding sections do not confine the sale to the sole purpose of supporting and educating the minor, nor is the power to sell limited to a sale for any stated purpose; nor is a sale by the foreign guardian invalid because the petition and the order say a sale and reinvestment in the State of the guardian's and minor's residence would be to the best interest of the minor, for those things are not required by the statute to be stated in either. *Bopst v. Williams*, 317.
6. **Illegal Marriage: Divorce: Adultery: Legitimacy of Children.** Section 342, Revised Statutes 1909, provides that "the issue of all marriages decreed null in law or dissolved by divorce shall be legitimate." In order that a child may be legitimate within the meaning of this statute, there must have been not only a marriage between the parents, but such a marriage as would be decreed null in law or dissolved by divorce in a proceeding in equity between them. In an action to annul a marriage in equity, for any reason, or for divorce, if both parties knowingly lived in adultery, there

STATUTORY AND STATUTORY CONSTRUCTION—Continued.

would be no marriage to annul and neither would be an innocent or injured party; neither would come into court with clean hands, and no relief could be granted to either. Unless the marriage is entered into by one or both of the parents honestly, innocently and in good faith it is not such a marriage as is contemplated by this section. *Stripe v. Meffert*, 366.

7. **Legitimation of Children.** Section 341, Revised Statutes 1909, provides that "if a man having by a woman a child or children, shall afterward intermarry with her and shall recognize such child or children to be his, they shall thereby be legitimated." This applies to cases where the relationship between the parties at the time the child was conceived was illegal and criminal as to both parents. In such case a subsequent legal marriage and recognition is necessary to legitimacy. *Ib.*
8. ———: **Adultery: Guilty Knowledge of Parties.** Where the evidence showed that both the parents were knowingly guilty of adultery, the child cannot be held legitimate under Section 342 at all, and not under Section 341 unless there has been a subsequent marriage between the parents accompanied by recognition by the father. *Ib.*
9. ———: **Statute a Codification of Former Law.** It is generally held that the Negotiable Instrument Law is a mere codification of the general law in relation to such instruments. This is certainly true of Section 10029, Revised Statutes 1909, which casts upon the holder the burden of proof of his good faith and lack of notice of the fraud when fraud has been shown in the procurement of the note sued on. *Downs v. Horton*, 414.
10. **Guarding Dangerous Machinery: Statute.** The Supreme Court has never construed Section 7828, Revised Statutes 1909 (Section 6786, Revised Statutes 1919), to mean that if the appliances provided to safely and securely guard dangerous machinery should, without any negligence of the master, suddenly get out of repair or fail to function then, in such case, there was a failure to comply with the statute. *State ex rel. Manker v. Ellison*, 647.

STATUTES CITED AND CONSTRUED.

Revised Statutes 1919.

Section	97, see page 139.	555, see pages 624, 638.
	98, see page 139.	845, see pages 431, 432
	105, see page 671.	1040, see page 689.
	328, see page 671.	1070, see page 164.
	329, see page 671.	1071, see page 164.
	334, see page 671.	1224, see pages, 461, 462.
	382, see page 331.	1233, see pages 461, 462.
	402, see pages 333, 337.	1314, see page 227.
	404, see page 333.	1323, see pages 133, 134.
	409, see page 330.	1520, see page 662.
	409, see pages 331, 332.	1699, see page 276.
	410, see pages 331, 332.	1946, see page 234.
	411, see pages 331, 332.	1970, see pages 252, 279.
	411, see pages, 327,	2023, see page 339.
	328, 330 and 332.	2024, see page 339.
	506, see page 29.	2175, see page 26.
		2198, see page 339.

STATUTES CITED AND CONSTRUED.—Continued.

- Section 2199, see page 339.
 2292, see pages 233, 234.
 2891, see page 461.
 2902, see pages 460, 461.
 3132, see page 58.
 3908, see pages 59, 88.
 4165, see page 233.
 4231, see page 138.
 5467, see page 245.
 5857, see page 671.
 6142, see page 172.
 6145, see page 172.
 6154, see page 175.
 6401, see page 173.
 6786, see page 650.
 7058, see page 332.
 7323, see pages 19, 28.
 7328, see pages 18, 19, 28.
 8301, see page 203.
 8313, see pages 162, 163.
 8316, see pages 162, 167.
 8656, see page 167.
 9382, see page 307.
 9749, see page 408.
 10478, see page 530.
 10522, see pages 531, 533.
 11456, see page 218.
 12543, see page 233.
 13429, see page 112.
 13430, see page 112.
 ch. 70, see page 333.
 ch. 50, art. 15, see page 174.
 ch. 102, art. 16, see page 218.

Revised Statutes 1909.

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| <p>Section 341, see pages 390, 391 and 392.
 342, see pages 386, 388.
 343, see pages 389, 390, 391 and 392.
 342, see page 371.
 417, see page 327.
 439, see page 330.
 441, see page 330.
 536, see page 29.
 555, see page 27.
 583, see page 624.
 959, see page 183.
 960, see page 181, 182 and 183.
 1247, see page 689.
 1886, see page 227.
 1894, see page 133.
 1960, see pages 80 and 81.
 2025, see page 385.
 2038, see page 445.
 2371, see page 398.
 2535, see pages 252, 342.
 2536, see page 342.
 2537, see page 342.
 2788, see page 26.
 3241, see page 43.
 3923, see page 136.
 4079, see page 89.
 4458, see pages 126, 127 and 128.
 4469, see page 127.
 4754, see page 8.
 5115, see page 88.</p> | <p>Section 5230, see page 136.
 5240, see page 128.
 5242, see pages 11 and 12.
 5385, see page 89.
 5438, see page 138.
 5968, see page 108.
 6383, see page 11.
 6937, see page 172.
 6940, see page 172.
 7568, see page 459.
 7828, see pages 650 and 653.
 8279, see page 595.
 8304, see pages 19, 22, 24 and 28.
 8309, see pages 18, 19, 24 and 28.
 8499, see page 16.
 9254, see page 202.
 9255, see page 202.
 9256, see page 202.
 9828, see page 298.
 10022, see pages 418 and 425.
 10025, see page 422.
 10026, see pages 422, 424, 427 and 429.
 10029, see pages 418, 422, 423, 425 and 432.
 11030, see page 218.
 ch. 84, art. 4, see pages 202 and 205.
 ch. 106 art. 13, see page 218.</p> |
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STATUTES CITED AND CONSTRUED.—Continued.

Revised Statutes 1899.

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| Section | 901, see page 25. | 4340, see pages 23, 28. |
| | 2383, see page 234. | 6239, see page 298. |
| | 4335, see page 23. | |

Revised Statutes 1889.

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|---------|---------------------|---------------------|
| Section | 2396, see page 25. | 5869, see page 175. |
| | 2396, see page 26. | 6869, see page 28. |
| | 4475, see page 387. | |

Revised Statutes 1879.

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|---------|---------------------|---------------------|
| Section | 3041, see page 458. | 3522, see page 461. |
| | 3052, see page 457. | 5968, see page 546. |
| | 3513, see page 461. | |

General Statutes 1865.

- Section 2, ch. 135, see page 386.
13, p. 724, see page 457.

Revised Statutes 1855.

- Section 24, p. 826, see page 330.
47, see pages 331, 332.
48, see pages 331, 332.
49, see pages 331, 332.
p. 1596, see page 455.
pp. 554, 555, see page 330.

Revised Statutes 1845.

- pp. 554, 555, see page 330.

Revised Statutes 1835.

- Section 8, p. 295, see page 300.
8, p. 370, see pages 454, 455.

Revised Statutes 1825.

- Section 8, p. 328, see page 387.

Laws 1919.

- p. 151, see page 180.
p. 570, see page 193.
p. 569, see page 187.
p. 572, see pages 187 and 203.
p. 573, see page 203.

Laws 1915.

- p. 359, see pages 202 and 205.
pp. 359, 360, see page 203.

Laws 1913.

- p. 220, see page 6.

Laws 1911.

- Sec. 5, p. 285, see page 173.
pp. 337, 341, see pages 202 and 206.
p. 430, see page 112.
Secs. 9254, 9255, see pages 206 and 207.

Laws 1885.

- p. 186, see page 458.

STATUTES CITED AND CONSTRUED—Continued.

Laws 1868.

pp. 20, 21, see page 307.

Laws 1851.

p. 190, see page 307.

Laws 1838-29.

Sec. 36, p. 49, see page 455.

STOLEN CERTIFICATES FOR BONDS. See **Negotiable Instruments.**

STREET IMPROVEMENT. See **Cities.**

STREET RAILWAYS. See **Railroads.**

SUMMONS.

1. **Process: Idem Sonans.** A defendant named Hornbeck was served with a summons under the name of Hornback. *Held*, that the service and a judgment founded on it were valid, the two names being *idem sonans*. *Little v. Browning*, 278.
2. **Infancy: No Guardian: Judgment.** Service of summons upon an infant defendant gives the court jurisdiction to proceed, and if it does proceed to judgment without appointing a guardian *ad litem* and there is no general guardian, the judgment, while erroneous, will not be subject to collateral attack. *Ib.*
3. **Appeal From Justice: Waiver of Defects in Process.** Under Revised Statutes 1909, Sections 7568 and 7579, the taking of an appeal from a justice of the peace invests the circuit court with power to hear and determine the case anew; and the appeal operates as a voluntary entry of appearance by the appellant in the circuit court, and if there is any defect in the summons or in the service thereof it is thereby waived. [Overruling *Meyer v. Ins. Co.*, 184 Mo. l. c. 488, and subsequent cases.] *Cudahy Packing Co. v. Railway Co.*, 452.
4. **Jurisdiction: Service of Process.** Where the husband and wife had for years occupied a certain property as a home, and after he had brought suit for divorce he fraudulently induced her as a part consideration for an allowance of suit money to leave said residence, a service of process on a maid in said home, in her suit for a separate maintenance allowance, brought after he had dismissed his suit for divorce, the said maid and his mother being the only members of his family, is a valid service, and brought him into court, although he was not in the State at the time. *Wagoner v. Wagoner*, 567.

TAXES AND TAXATION.

1. **Bonds: Tax Ordinance: Per Cent Tax.** Although the ordinance which undertakes to levy a tax to pay the interest and principal of the bonds issued by the city does not levy a per cent tax on all the property, yet if it does say that there shall be annually levied a tax which shall raise a stated amount for each year, and these amounts are fully sufficient to meet the interests and the sinking fund, it meets the requirements of the Constitution. But even if it were an insufficient levy of a tax, that would not invalidate

TAXES AND TAXATION—Continued.

the bonds, because the city can be compelled, by the self-enforcing provision of the Constitution, to provide for the payment of the interest and principal as they become due. *State ex rel. City of Jefferson v. Hackmann*, 156.

2. **City Indebtedness: Maximum Limit: Last Previous Assessment.** The assessment mentioned in Section 12 of Article 10 of the Constitution limiting the indebtedness that a city of the third class may incur in any year to "five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness," means a complete assessment, and the words "previous to the incurring of such indebtedness," mean previous to the authorization of the indebtedness at the election held by the voters of the municipality. So that where the election was held on September 16, 1919, and the State Board of Equalization had not completed the equalization of the 1918 assessment and certified its action thereon previous to said September 16, 1919, the assessment of 1916 was the "next before the last assessment," and must be used as the measuring rod in determining whether the bonds authorized at such election, added to the city's then existing indebtedness, exceeded five per cent of the value of the taxable property therein. *State ex rel. Carthage v. Hackmann*, 184.
3. ———: ———: **Existing Indebtedness: For City Waterworks.** In determining whether bonds authorized at an election to be issued by a city exceeds the five per cent of the value of the taxable property mentioned in Section 12 of Article 10 of the Constitution, existing indebtedness due to the issuance of bonds for the construction of municipal waterworks is not to be considered. In view of Section 12a and the amendment of said Section 12a adopted in 1920, the indebtedness authorized by said Section 12a for the purpose of constructing or purchasing waterworks, electric or other light plants, to be owned exclusively by the city, is not to be treated as a part of the existing indebtedness in determining the validity of a subsequent issue of bonds under the authority of Section 12 of Article 10. [Overruling *State ex rel. Columbia v. Wilder*, 197 Mo. 1.] *Ib.*
4. **Street Improvement: Unequal Assessment.** Proceedings for the improvement of a street are not invalid because all property owners will be charged the same amount per front foot, regardless of whether the street in front of the particular property is entirely resurfaced or only holes or depressions therein are patched, the proposed contract being for the whole improvement, and the cost to be defrayed by a special tax bill on the property fronting or abutting on the streets where the work is done, in the proportion that the linear feet of each lot fronting thereon bears to the total number of linear feet of all property chargeable with the cost. All property in the improvement district is benefited alike and all should bear proportionately the cost, without regard to what particular work is done in front of a given lot; and there is no such unequal assessment as renders the proceeding invalid. *Asel v. City of Jefferson*, 195.
5. ———: **Tax Bills to Contractor.** Under the Act of 1919 special tax bills for the re-surfacing of a street may be issued directly to the contractor doing the work, or to the city and by it assigned to the contractor. *Ib.*
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TRIALS.

1. **Opening Statement.** It is not incompetent for the prosecuting attorney to mention any fact in his opening statement which he can prove and it is competent for him to prove. It was not improper for the prosecuting attorney in his opening statement to state that defendant had attempted to spirit away the prosecutrix, since it was proper to prove that fact and there was evidence tending to prove it. *State v. Howe*, 1.
2. **Defendant as Witness: Cross-Examination: Former Conviction.** Under the statute (Sec. 6383, R. S. 1909), a defendant, who takes the witness stand in his own behalf, may be asked on cross-examination if he was ever convicted of felony or other crime. *Ib.*
3. **Evidence: General Objection: Exception.** An exception exists to the rule that a general objection that certain evidence is irrelevant, incompetent and immaterial, is too broad and sometimes constitutes no objection at all. It is that if the evidence objected to is not competent for any purpose a specific objection has no office and a general objection is sufficient. *State ex rel. Brew. Co. v. Ellison*, 139.
4. ———: ———: **Repetition.** Once an objection has been seasonably made and overruled and exception saved, it is not necessary, in order to save the point, to continue to repeat the objection to the same testimony. On the contrary, persistence in a running fire of the same objection to the same testimony might become indecorous and disrespectful. *Ib.*
5. ———: ———: **Materiality Not Foreseen.** The admission of incompetent testimony cannot be excused on the theory that at the opening of the trial the court cannot know that the testimony objected to may not prove competent in some way at later stages of the proceeding. If this were a true theory, then any evidence wholly incompetent can be admitted without error, since it is open to scarcely any other than a general objection, and no general objection would be good at the beginning of the trial. *Ib.*
6. ———: **Responsive Answer: Shown by Subsequent Testimony.** The answer "ten children" is responsive to the question, "Who compose your family?" and it is not shown to be irresponsible by subsequent testimony showing it to be in part untrue. *Ib.*
7. ———: **Objections: Made by One of Several Defendants.** When one of several defendants makes an objection to the admission of testimony it is unnecessary for the others to repeat it in order to put themselves in position to base an assignment of error upon it on appeal. *Ib.*
8. ———: ———: ———: **Motion for New Trial.** Likewise, one of a group of defendants may, in his motion for a new trial, adopt an objection made by another defendant to a ruling of the trial court in admitting evidence and base an assignment of error thereon. *Ib.*
9. **Special Verdict: Incomplete Determination: Motion for New Trial.** Where there is a special verdict, leaving some of the issues to be determined, a motion for a new trial filed within four days after their determination, is timely filed. *Stripe v. Meffert*, 366.

TRIALS—Continued.

10. **Negotiable Note: Proof of Fraud: The Jury.** Notwithstanding the jury are the judges of the credibility of testimony, yet, where in an action by an indorsee of a promissory note against the makers it is admitted that the note was originally tainted with fraud on the part of the payee from whom the indorsee obtained it, the latter may show by oral evidence that he had no notice of the fraud when he took the note, and the jury is not at liberty to disbelieve this evidence if it is uncontradicted, unimpeached and free from impeaching circumstances; and is not at liberty to find that the indorsee had actual knowledge of the infirmity, or of facts which made his taking of the note an act of bad faith, within the meaning of Section 10026, Revised Statutes 1909, merely because there is a lack of what the jury deems credible evidence in support of the claim of the indorsee. *Downs v. Horton*, 414.
11. ———: **Evidence: The Jury.** When the indorsee of a negotiable instrument in an action on it against the makers, has shown that he purchased it for value before maturity in good faith, and has disclosed all the facts and circumstances attending the purchase, and they are all consistent with good faith and negative any notice of the fraud, and no damaging or discrediting circumstances of substantial value are shown, and defendant produces no counter-vailing or impeaching evidence, the jury may not, by disbelieving the plaintiff's evidence, make a finding that after all the plaintiff did have actual knowledge of the fraud, and that there were facts known to him which made his act in taking the note bad faith on his part. *Ib.*
12. ———: **Order of Evidence: Directed Verdict.** In an action on a negotiable instrument, where fraud is charged by the answer, it is incumbent on the defendant to first offer evidence of facts tending to show the fraud and nothing more. This raises a presumption which calls upon the plaintiff to disclose the facts which are peculiarly within his knowledge. The plaintiff then gives evidence of all the facts and circumstances under which he acquired the paper, and the presumption takes flight. If the plaintiff's evidence is such that his good faith and want of notice are the only inferences that a fair-minded person could draw from it, it then devolves upon the defendant to prove specific facts tending to show plaintiff's actual knowledge of the fraud or his bad faith. If defendant offers no such evidence, then clearly he has failed to offer any evidence in support of his affirmative defense that plaintiff had notice of the fraud when he took the paper, and the plaintiff is entitled to a directed verdict. *Ib.*
13. **Accident Insurance: Prima-Facie Case: Delivery: Presumption: Directed Verdict: New Trial.** The possession of the policy by the insured raises the presumption that it had been delivered and paid for, or that credit had been given for the premium; and plaintiff having made out a prima-facie case by introducing the policy in evidence and proving the insured's death, by external bodily injuries accidentally received, within the time covered by the policy, it is error to direct a verdict for defendant, however strong and convincing may be the evidence introduced by defendant to show that the policy had not been delivered or the premium paid before the death of the insured. The fact of non-delivery, where the policy was in the possession of the insured, is an affirmative defense, and the weight of the evidence to sustain it is a matter for the jury, which the court cannot lawfully usurp.

TRIALS—Continued.

Held, by GRAVES, J., concurring, that the presumption of a delivery arises upon the showing that the policy was in possession of the deceased, and such is a rebuttable presumption, but the credibility of facts sufficient in the mind of the court to destroy the presumption is for the jury to determine, and hence where the court, in the presence of such facts, has directed a verdict, for the defendant, a motion for a new trial should be sustained. But the trial court has authority to grant a new trial on the ground that the verdict is against the weight of the evidence, and where there is no directed verdict and the jury, in the face of facts which destroy plaintiff's prima-facie case, return a verdict for plaintiff, the court should set it aside. *Lafferty v. Casualty Co.*, 555.

14. **Certiorari to Court of Appeals: Conflict of Opinions: Negligence: Pleading Generally: Res Ipsa Loquitur: Evidence of Specific Negligence.** The petition in a suit by a servant against his master, relator herein, for damages caused by the servant's hand being caught in a sausage-making and meat-chopping machine, after describing the machine and the manner of operating it and of starting and stopping it, alleged that "said machinery by reason of the negligence of the defendants was suddenly and without warning or notice to the plaintiff started and caused to revolve, and the wheels and cylinder and crusher and knives thereof to revolve and turn, whereby the plaintiff's right hand and thumb and fingers thereof were caught in said machine." Relator's motion to make more definite and certain and its demurrer, having been successively overruled and no exceptions saved, it filed answer and went to trial. On the trial, it objected to any evidence because the petition did not state a cause of action, which objection was overruled. In the Court of Appeals this objection was renewed on the ground that the petition was intended to be based upon the doctrine of *res ipsa loquitur* and lacked averments essential thereto. The Court of Appeals decided that, inasmuch as on the trial, the case, by proof and instructions, was submitted to the jury upon specific negligence within the allegations of the petition, the rule *res ipsa loquitur* was entirely removed from the case. *Held*, that this decision does not conflict with the prior rulings of the Supreme Court. *State ex rel. Packing Co. v. Reynolds*, 697.
15. ———: ———: ———: ———: **Failure to State Cause of Action: Objection at Trial.** Where a motion to make the petition more definite and certain is overruled and no exception saved and a demurrer to the petition is overruled and thereafter an answer is filed and the case goes to trial, a general objection by defendant to any evidence on the ground that the petition does not state a cause of action, must be treated as if such motion and demurrer had never been filed; and in such case the petition will be regarded as sufficient after judgment, if, after allowing all reasonable implications and intendments in its favor, there is a sufficient statement to apprise defendant with reasonable certainty of the character of the action and the issues to be met. The Court of Appeals having so decided, its decision is not in conflict with previous rulings of the Supreme Court. *Ib.*

TRUSTS AND TRUSTEES.

1. **Annual Accounting of Trustee.** The Act of 1911 (now Secs. 13429 and 13430, R. S. 1919), requiring a trustee vested with the title to

TRUSTS AND TRUSTEES—Continued.

an estate to make an annual report to the circuit court, applies only to procedure, is remedial in its operation, and does not affect the right of a trustee who became vested with the estate prior to its enactment. Such trustee has no vested right in the manner of accounting for his trust. *McManus v. Park*, 109.

2. ———: **Act of 1911: Ambiguous Terms: Construction: Remedy.** Where a statute is ambiguous in its terms and affects substantive or vested rights, all ambiguity therein will be resolved in favor of its prospective operation and its constitutionality; but where the statute relates to the remedy and is ambiguous or of doubtful application, it is liberally construed in order to effectuate the purpose of its enactment, and to that end all doubts are resolved so as to affect past as well as future transactions. The evident purpose of the Act of 1911, requiring trustees to make annual reports to the circuit court, was that said remedy should apply to all trustees, whether appointed by the court before or after its enactment. It applies to a will disposing of an estate before as well as after the passage of the act, and it applies where a trustee appointed by the will "has become disqualified to act, resigned or died," and it applies to trustees appointed by the court before the act was passed. *Ib.*
3. **Named in Trust Instrument and Appointed by Court.** A relation of personal trust exists between the testator in a will and the trustee appointed thereby; the trustee appointed by the court, upon the removal, death or resignation of the trustee appointed by the will, is under no personal obligation, but only his official obligation to account to the beneficiary, or to exhibit the state of the property in his charge, and before the Act of 1911 was enacted there was no way to compel an accounting from him except upon an allegation of mismanagement, fraud or incompetence, and the very purpose of having accounts filed was that the beneficiary might ascertain whether there was fraud or incompetence which would justify action against the trustee; and the purpose of said act was that the circuit court might retain jurisdiction of the appointed trustee in all matters pertaining to the administration of a trust estate, and compel him to make an annual report of the condition of the estate, and to meet the contrary ruling in *State ex rel. McManus v. Muench*, 217 Mo. 124. *Ib.*
4. **Accounting to Cestui Que Trust.** A trustee in charge of trust property must account to his *cestui que trust*, and he is accountable on the termination of the trust at her death; and in a suit for an accounting brought against his executrix, it is significant that there is no showing that he did not account at the death of the *cestui que trust*, although he survived her four years; without such a showing, it is a matter of grave doubt whether plaintiff makes out of prima-facie case. *Price v. Boyle*, 257.

ULTRA VIRES CONTRACTS. See **Corporations.**

VERDICT.

1. **Excessive: Passion and Prejudice: Reversal.** Where plaintiff's evidence upon the merits of the controversy is substantial and no error was committed against defendant during the progress of the trial, a verdict for a reasonable amount will be upheld on appeal. But if the verdict, in the light of all the facts, appears to have

VERDICT—Continued.

- resulted either from passion or prejudice on the part of the jury, the judgment will be reversed, and the cause remanded for a new trial. *Jones v. Frisco Ry. Co.*, 64.
- 2. **Excessive: Passion and Prejudice: Reversal: Contradictory Testimony.** Where plaintiff was a trespasser upon defendant's moving freight train, and testified that as he attempted to climb up the iron ladder of a car a brakeman on the top of the car struck him with an axe-handle, knocked him off he fell on sandy ground which sloped towards the track, he rolled towards the track and the car wheels cut off his foot, and five witnesses testified that he told them on the day of the accident that he got on a car which was two or three cars ahead of the car which one of his companions had boarded, that he wanted to get off and get back to the car where such companion was, and that, in doing so, he fell off of the car and got his foot cut off, and these witnesses were either guilty of wilful perjury in so testifying, or plaintiff was guilty of perjury in denying that he made such statements to them; and where the conductor of the train and a brakeman testified that both brakemen were in the caboose at the time of the accident, and no brakemen was on the top of any car; and where the evidence is overwhelmingly against plaintiff as to the manner in which he claims to have been injured, and the jury, nevertheless, ignored it was returned a verdict for \$15,000, which was \$2500 more than the trial court ruled was reasonable compensation, and which the Supreme Court considers was excessive, at least to the extent of \$5,000, if no error had been committed during the progress of the trial, it will be ruled that the verdict was the result of passion or prejudice on the part of the jury, and that justice requires that the judgment be reversed, and the cause remanded for a new trial. *Ib.*
- 3. **Unreasonably Small: Inadequacy.** An appellant has the right to have set aside a verdict for personal torts either excessively large or ridiculously small, where the result indicates passion, prejudice or misconduct on the part of the jury. In determining whether it is such, the presumption is in favor of the good conduct of the jury; and if upon the whole record the case predominates in favor of the defendant or the evidence is evenly balanced, the courts will refuse to interfere with a nominal verdict, although at first view it may appear illogical. Inadequacy of the award is not alone a sufficient basis for setting aside the verdict. *Cochran v. Wilson*, 210.
- 4. ———: ———: **Liability of Defendant.** And where there is no evidence that the space between the school building and the theatre was in control of the theatre owner, and the trial court might for that reason have sustained a demurrer to the evidence, the verdict of \$250 for a pedestrian, who was directed by said defendant's employee to enter the theatre from said passageway, will not be disturbed upon plaintiff's appeal alone. *Ib.*
- 5. **Excessive: \$20,000.** Where plaintiff's injuries were unusual in severity and painfulness, rendering her a cripple for life and incapable of normal activities and life's most fruitful enjoyments, a verdict for \$20,000 is not excessive. *Mayne v. K. C. Rys. Co.*, 235.
- 6. **Excessive: \$20,000.** Where the injury to a youth eighteen years of age consisted of the loss of one eye, and there is a lurking chance of the impairment of his other eye by reason of the injury

VERDICT—Continued.

sustained, a verdict of \$20,000 is too large by \$7,500. *Adams v. Ry. Co.*, 535.

7. **Accident Insurance: Prima-Facie Case: Delivery: Presumption: Directed Verdict: New Trial.** The possession of the policy by the insured raises the presumption that it had been delivered and paid for, or that credit had been given for the premium; and plaintiff having made out a prima-facie case by introducing the policy in evidence and proving the insured's death, by external bodily injuries accidentally received, within the time covered by the policy, it is error to direct a verdict for defendant however strong and convincing may be the evidence introduced by defendant to show that the policy had not been delivered or the premium paid before the death of the insured. The fact of non-delivery, where the policy was in the possession of the insured, is an affirmative defense, and the weight of the evidence to sustain it is a matter for the jury, which the court cannot lawfully usurp.

Held, by GRAVES, J., concurring, that the presumption of a delivery arises upon the showing that the policy was in possession of the deceased, and such is a rebuttable presumption, but the credibility of facts sufficient in the mind of the court to destroy the presumption is for the jury to determine, and hence where the court, in the presence of such facts, has directed a verdict for the defendant, a motion for a new trial should be sustained. But the trial court has authority to grant a new trial on the ground that the verdict is against the weight of the evidence, and where there is no directed verdict and the jury, in the face of facts which destroy plaintiff's prima-facie case, return a verdict for plaintiff, the court should set it aside. *Lafferty v. Casualty Co.*, 555.

WAIVER.

1. ———: **Judgments: Defective Process: Appearance.** The question whether process should have been served upon the mayor rather than the city clerk, in the suit by a creditor to recover judgment against the city, dropped out of the case when the attorney for the city appeared and filed answer. *State ex rel. City of Jefferson v. Hackmann*, 156.
2. **Damages: Grade of Street: Estoppel.** Where there was embodied in the deed of dedication of a sub-division a clause to the effect that "all avenues and alleys laid out in said sub-division, and for better identification etched on the above plat, are hereby dedicated to public use forever, and any claims for damages which may arise by reason of changing the present surface of said avenues and alleys to conform to such grades as may hereafter be established by the city, are hereby waived," and said deed of dedication was accepted by the city and duly recorded, and thereafter the grade of one of said avenues was changed to seven feet below the natural surface, after plaintiffs, with notice, bought lands abutting thereon from the dedicator, they are estopped to claim damages contrary to said waiver. *Stapenhorst v. St. Louis*, 285.
3. ———: ———: **Consideration: Acceptance.** The acceptance by the city of a deed dedicating streets to public use and containing a waiver of damages for changes in the grade is in itself a sufficient consideration to sustain both the dedication and waiver. *Id.*

WAIVER—Continued.

4. **Damages: Grade of Street: Damages to Abutting Property.** The Constitution of 1875, in declaring that private property cannot be taken or damaged for public use without just compensation, did not prevent a proprietor of a sub-division of land, who wishes to sub-divide it into blocks, streets, lots and alleys, from expressly authorizing the city, in the deed of dedication, to grade the streets without paying damages to abutting property. By his deed of dedication, the proprietor may give up his right to compensation for the uses included in the dedication, both for the taking of the property used as the street and for damages to the adjoining property resulting from such use. *Slapenhorst v. St. Louis*, 285.
5. ———: ———: **Bunning With Title: Easement.** Where the owner of land by his deed of dedication gives and dedicates to the public an easement to use and grade the land embraced in the street without the payment of damages to the dedicator's adjoining land, and such deed is accepted by the city and is acknowledged and recorded, subsequent purchasers from such owner of lots abutting on the street take title subject and servient to such public easement, which becomes an encumbrance upon their lots and runs with the title. The city's right to grade without paying damages, in such case, is an easement, and not a mere revokable license. *Ib.*
6. ———: ———: **Coerced by City: Evidence.** That the board of public improvements refused to approve the plat of the subdivision unless the deed of dedication contained a release of damages for subsequent grading of the streets, can only be shown by its records; for neither the city nor the public is bound to take knowledge of its acts or words unless they are of record. *Ib.*
7. ———: ———: ———: **Power of Board: Abuse of Discretion.** Under the old charter of St. Louis declaring that "the Board of Public Improvements shall have authority to approve maps or plats of sub-divisions which fully dedicate to the public use, streets, alleys and public places," said board had authority to accept a deed of dedication or plat waiving damages for subsequent grading of the streets so dedicated, and having such authority it did not abuse its discretion by refusing to approve such plat or deed unless it contained a waiver of such damages. *Ib.*
8. ———: ———: **Ultra Vires.** The acceptance by the City of St. Louis of a deed of dedication containing a waiver of damages for subsequent change in the grade of streets is not beyond the power of the city, nor of any statute, nor of any provision of the Constitution. And since the statute expressly provides that when property owners lawfully entitled to damages for grading a street "shall not have waived all right or claim thereto" ordinances providing for such grading shall also provide for ascertaining and paying the damages, there is no more proper or timely way of making a waiver of such damages than in the deed of dedication. *Ib.*
9. ———: **Acceptance of Benefit: Waiver of Right to Contest: Ancestor and Heir.** One who himself accepts a benefit under a will, as well as one whose ancestor, through whom he makes claim, accepts such benefit, waives the right to contest the validity of such will. *Bernero v. Trust Co.*, 602.

WIDOW'S ELECTION TO TAKE UNDER WILL. See **Wills**.

WILLS.

- 1 **Trustees: Named in Trust Instrument and Appointed by Court.** A relation of personal trust exists between the testator in a will and the trustee appointed thereby; the trustee appointed by the court, upon the removal, death or resignation of the trustee appointed by the will, is under no personal obligation, but only his official obligation to account to the beneficiary, or to exhibit the state of the property in his charge, and before the Act of 1911 was enacted there was no way to compel an accounting from him except upon an allegation of mismanagement, fraud or incompetence, and the very purpose of having accounts filed was that the beneficiary might ascertain whether there was fraud or incompetence which would justify action against the trustee; and the purpose of said act was that the circuit court might retain jurisdiction of the appointed trustee in all matters pertaining to the administration of a trust estate, and compel him to make an annual report of the condition of the estate, and to meet the contrary ruling in *State ex rel. McManus v. Muench*, 217 Mo. 124. *McManus v. Park*, 109.
2. **Construction of: Testator's Intention: How Ascertained.** The cardinal rule for the construction of wills is to have due regard to the directions of the will and the true intent and meaning of the testator, which is to be gathered from the will itself and the whole of it, viewed in the light of the circumstances surrounding its execution. *Bernero v. Trust Co.*, 602.
3. ———: ———: ———: **Interpolating Words.** In cases where a clear and definite provision is followed by a repugnant or inconsistent provision not equally clear and definite, tending to defeat or cut down the prior one, or where the provision sought to be sustained by the actual words used is against the manifest intention of the testator, as gathered from the entire instrument, or where the exact wording, or vague and uncertain meaning, would result in a disposition of the property devised utterly at variance with the natural instincts of the testator, such as the defeat of succession in title in the heirs of a favorite child of testator for the benefit of strangers, the court may interpolate words in order to carry out the intention of the testator. *Ib.*
4. ———: ———: ———: ———. To justify the court, when seeking to construe a will, in interpolating words to arrive at the testator's intention, the will, on its face, must show some contradiction or repugnancy, or that it is incomplete; and it must then further appear from the face of the will itself that the testator has inadvertently or unconsciously omitted certain words or language which are necessary to make his intention clear, and also what words or language have been omitted and that the testator clearly intended to make a disposition which the supplied words will effectuate. *Ib.*
5. ———: ———: ———: ———. Where the meaning of the testator has been clearly and distinctly expressed in plain and unequivocal language, the court will not supply or interpolate words not used by the testator, however much the testator's disposition of his estate may appeal to the court as hard and unnatural. *Ib.*
6. ———: **Particular Estate Dependent on Contingency: Limitations Consecutive Thereon Likewise Dependent.** When a contingent particular estate is followed by other limitations, the rule is that, if the ulterior limitations be immediately consecutive on the particu-

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lar contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and, therefore, appear not reasonably applied to the ulterior limitations. *Bernero v. Trust Co.*, 602.

7. ———: **Case Adjudged.** The testator devised certain real estate to his wife to have and enjoy during her natural life and at her death the same to pass to their adopted son, if he should survive her, to have and enjoy during his natural life, and at his decease to pass to and vest in fee in his children if any he have, or their descendants, but in default or failure of such direct heirs, children or grandchildren him surviving, then at the time of his death the title to said realty in fee should pass to and vest in testator's right heirs; if, however, testator's said wife should survive said adopted son, then she, said wife, was thereby empowered to devise said realty as she should see fit, or if she should fail to make such testamentary disposition of same, then said realty, upon her death, should vest in testator's right heirs, if she should survive said adopted son. The adopted son married after testator's death, and had one child, the plaintiff herein, and then died before testator's wife. Thereafter testator's wife died testate and by her last will exercised said power to devise said realty and devised the same in trust for the children of her sister, and made a bequest of \$10,000 to a trustee in trust for plaintiff. This suit is one to quiet title to said realty in plaintiff, who claims a fee. *Held*, that the life estate of testator's adopted son, plaintiff's father, was contingent upon his surviving testator's wife and the remainder in fee to said son's descendants was likewise dependent upon the same contingency and that, inasmuch as said son predeceased said wife, the plaintiff took no title to or interest in said realty, under said will. (*HIGBEE and WOODSON, JJ.*, dissenting.) *Ib.*
8. ———: **"Right Heirs:" Testator's Definition of Terms.** Inasmuch as it appears from testator's will that in one clause of his will he used the terms, "my right heirs" as descriptive of a class different from the "direct heirs, children or grandchildren" of his adopted son, the court will give the same meaning to said words, "right heirs," whenever used in said will, in the absence of any other definition of them; and therefore plaintiff could not claim title to said realty under said will as a "right heir" of testator. *Ib.*
9. **Acceptance of Benefit: Waiver of Right to Contest: Ancestor and Heir.** One who himself accepts a benefit under a will, as well as one whose ancestor, through whom he makes claim, accepts such benefit, waives the right to contest the validity of such will. *Ib.*
10. **Widow: Renunciation: Election.** Testator's estate was worth about \$200,000, of which \$160,000 was personal property and \$40,000 was real estate. His homestead was worth about \$14,000. His three children by a former marriage and his widow survived him. By his will he gave his widow the use of his homestead and \$200 per month to be paid to her each month out of his estate during her life or widowhood and also all his household effects. He also left an annuity to his mother and then gave the rest of his estate to his three children equally, and appointed his wife and son executors of his will without bond. The executors presented the will

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for probate and made formal application for letters testamentary, which were granted and they qualified. They filed an inventory and made settlements of the estate in the probate court. These papers were prepared and signed by the son, but were also signed by the widow, at his direction. He employed attorneys to advise and assist him in the administration, the widow leaving the whole matter to him and taking no part therein. He paid her the monthly allowance provided by the will for eleven months, taking receipts therefor reciting that the payments were under the will. Neither the son nor the attorneys informed her that she had the right to renounce the will and she was ignorant of the law. Nearly a year after her husband's death she first learned of her right to renounce the will and at once executed and filed her renunciation to take under the will. She and testator's infant daughter, of whom the will appointed her guardian, continued to reside in the homestead where they were living when the cause was tried in the circuit court. After her renunciation was filed the monthly allowance was paid to her for a year and she receipted for these payments as being "on account of her share of the income of said estate." She also received household goods appraised at \$445. In addition to the payments to the widow, no part of the personalty was distributed except the payments to testator's mother and an allowance to the daughter made under order of the probate court. The entire personal estate, less the above mentioned payment, was in the hands of the executors. There was no evidence that either of the children had acted upon or been prejudiced by the fact that the widow had received the monthly payments. *Held*, (1) That the widow had the right to occupy the homestead rent free until her dower was assigned and her occupancy was passive and no more indicative of claim under the will than under the right of quarantine; (2) That she was entitled absolutely without election on her part, to a child's share of the personal estate, in this case one-fourth or approximately \$40,000; (3) That all of her acts having been done in ignorance of her legal rights and she having renounced the will within the time and in the manner required by the statutes, and the other parties interested in the estate not having been prejudiced by what she had done, she was not estopped to renounce the will and was not to be held as having elected to take under it. [GRAVES, ELDER and J. T. BLAIR, JJ., dissenting.] *In re Goessling v. Goessling*, 663.

11. ———: ———: **Bequest of Personalty.** A bequest of personalty to a widow does not bar her dower in real estate; yet, if the bequest be in lieu of dower, she cannot accept the bequest and also her dower, but is put to her election. *Ib.*
12. ———: ———: **Stare Decisis.** The question raised by the appeal in this case has been settled by repeated decisions of the Supreme Court, which have now become a rule of property, the adherence to which is indispensable to the due administration of justice. *Ib.*

Rules for the Government of the Supreme Court of Missouri.

REVISED TO APRIL 12, 1921.

Rule 1.—Chief Justice, Duty. The Chief Justice shall be elected for a term of one and three-sevenths years, and shall superintend matters of order in the courtroom.

Rule 2.—Motions to be Written, etc. All motions shall be in writing, signed by counsel and filed of record. At least twenty-four hours notice of the filing of same, unless herein otherwise provided, shall be given to the adverse party, or his attorney.

Rule 3.—Argument of Motions. No motion shall be argued unless by the direction of the court.

Rule 4.—Diminution of Record, Suggestion after Joinder in Error. No suggestion of diminution of record in civil cases will be entertained after joinder in error, except by consent of the parties.

Rule 5.—Application for Certiorari. Whenever *certiorari* is applied for to correct a record, an affidavit shall be made thereto of the defect in the transcript sought to be supplied and at least twenty-four hours notice of such application shall be given to the adverse party or his attorney.

Rule 6.—Reviewing Instructions. To enable this court to review the action of the trial court in giving and refusing instructions it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the testimony of the witnesses shall be stated in narrative form, avoiding repetition and omitting immaterial matter.

Rule 7.—Bills of Exceptions in Equity Cases. In equity cases the entire evidence shall be embodied in the bill of exceptions; provided it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to its admissibility or legal effect; and provided further that parole evidence shall be reduced to a narrative form where this can be done and its full force and effect be preserved.

Rule 8.—Presumptions in Support of Bills of Exceptions. In the absence of a showing to the contrary, it will be presumed as a matter of fact that bills of exceptions contained all the evidence applicable to any particular ruling to which exception is saved.

Rule 9.—Making up Transcripts. Clerks of courts in making out transcripts of the record for the Supreme Court, unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause, shall not set out the original or any subsequent writ or the return thereof, but in lieu of same shall simply note the dates respectively of the issuance and execution of the summons.

If any pleading be amended, the clerk in making out the transcript will only insert therein the last amended pleading and will set out no abandoned pleading or part of the record not called for by the bill of exceptions; nor shall any clerk insert in the transcript any matter touching the organization of the court or any continuance, motion or affidavit not made a part of the bill of exceptions.

Rule 10.—“Appellant” and “Respondent:” What They Include. Whenever the words appellant and respondent appear in these rules they shall be taken to mean and include plaintiff in error and defendant in error and other parties occupying like positions in a case.

Rule 11.—Abstracts in Lieu of Transcript, When Filed and Served. Where the appellant shall, under the provisions of Section 1479, Revised Statutes 1919, file a copy of the judgment, order or decree in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstracts at least thirty days before the cause is set for hearing, and in a like time file ten copies thereof with our clerk. If the respondent is not satisfied with such abstract, he shall deliver to the appellant an additional abstract at least fifteen days before the cause is set for hearing, and within like time file ten copies thereof with our clerk. Objections to such additional abstract shall be filed with our clerk within ten days after service of such abstracts upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

If the respondent desires to make objections to the consideration of any question because appellant's abstract of the record fails to show the timely filing or the overruling of the motion for new trial or in arrest of judgment, or that the ruling on any such motion was excepted to, or that the bill of exceptions was duly signed or filed, or that the appeal was duly taken, such objections and the reasons therefor shall be served in writing on the appellant or his counsel, fifteen days before the day on which the cause is docketed for hearing, or within fifteen days after the abstract is served. Any such objections not so specified shall be deemed waived and will not be considered by the Court. After service of such objections and reasons appellant shall have ten days within which to perfect his abstract of the record by filing in this Court a certified copy of so much of the record proper or bill of exceptions as will show the true entries, orders or rulings with respect to which the sufficiency of the abstract of the record is challenged by respondent. [Adopted as an amendment to Rule 11, December 29, 1920.]

Rule 12.—Abstracts: When Filed and Served. Where a complete transcript is brought to this court in the first instance, the appellant shall deliver to the respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with our clerk not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file an additional abstract he shall deliver to the appellant a copy of same at least five days before the cause is set for hearing and file ten copies thereof with our clerk on the day preceding that on which the cause is to be heard.

Rule 13.—Abstracts: What They Shall Contain. The abstracts mentioned in Rules 11 and 12 shall be printed in fair type, be paged and have a complete index at the end thereof, which index shall specifically identify exhibits where there are more than one, and said abstracts shall set forth so much of the record as is necessary to a complete understanding of all the questions presented for decision. Where there is no controversy as to the pleadings or as to deeds or other documentary evidence it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be in narrative form except when the questions and answers are necessary to a complete understanding of the testimony. Pleadings and documentary evidence shall be set forth in full when there is any question as to the former or as to the admissibility or legal effect of the latter; in all other respects the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

If in any case any matter which should properly be set forth in the abstract as a part of the record proper, shall appear in the abstract as a part of the bill of exceptions, or vice-versa, such matter shall be considered and treated as if set forth in its proper place, and all objections on account thereof shall be deemed waived, unless the other party shall, within fifteen days after the service of such abstract upon him, specify such objections and the reasons therefor in writing and serve the same upon the opposing party or his counsel; and in the event such objection be so made, the other party may within ten days from the service of such written objection upon him or his counsel, correct his abstract so as to obviate such objection, if under the facts as shown by the record proper or the bill of exceptions in the trial court, such correction can truthfully be made. [Adopted as an amendment to Rule 13, December 31, 1920.]

Rule 14.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases printed, indexed and uncertified copies of the entire record, filed and served within the time prescribed by the rules for serving abstracts, shall be deemed a full compliance with said rules and dispense with the necessity of any further abstracts.

Rule 15.—Briefs: What to Contain and When Served. The appellant shall deliver to the respondent a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the appellant at least five days before the last named date, and the appellant shall deliver a copy of his reply brief to the respondent not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed. The brief for appellant shall distinctly allege the errors committed by the trial court, and shall contain in addition thereto: (1) a fair and concise statement of the facts of the case without reiteration, statements of law, or argument; (2) a statement, in numerical order, of the points relied on, with citation of authorities thereunder, and no reference will be permitted at the argument to errors not specified; and (3) a printed argument, if desired. The respondent in his brief may adopt the statement of appellant; or, if not satisfied therewith, he shall in a concise statement correct any errors therein. In other respects the brief of respondent shall follow the order of that required of appellant. No brief or statement which violates this rule will be considered by the court.

In citing authorities counsel shall give the names of the parties in any case cited and the number of the volume and page where the case may be found; and when reference is made to any elementary work or treatise the number of the edition, the volume, section and page where the matter referred to may be found shall be set forth. [As amended and adopted October 23, 1917.]

Rule 16.—Failure to Comply with Rules 11, 12, 13 and 15. If any appellant in any civil case fail to comply with the rules numbered 11, 12, 13, and 15, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error; or, at the option of the respondent continue the cause at the cost of the party in default.

Rule 17.—Costs: When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstract filed in lieu of a complete transcript under Section 1479, R. S. 1919, which fails to make a full presentation of the record necessary to be considered in disposing of all the questions arising in the cause. But in cases

brought to this court by a copy of the judgment, order or decree instead of a complete transcript, and in which the appellant shall file a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

Where a manuscript record has been or may be filed in this court, a reasonable fee for printing an abstract of the record or the entire record in lieu of an abstract may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in cases where costs may properly be taxed for printing, as prima-facie evidence of the reasonableness thereof; and objections thereto may be filed within ten days after service of notice of the amount of such charge.

Rule 18.—Service of Abstracts and Briefs. Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgement of such opposing party or his attorney or the affidavit of the person making the service, and such evidence of service must be filed with the abstract or brief.

Rule 19.—Service of Abstracts and Briefs in Criminal Cases. Attorneys for appellants in criminal cases in which transcripts have been filed in the office of the clerk sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement containing apt references to the pages of the transcript, with an assignment of errors and brief of points and an argument, and serve a copy thereof upon the Attorney-General, and thereupon the Attorney-General shall, fifteen days before the day of hearing, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

When such transcript has been filed in this court fifteen days before the first day of the term at which such case is set for hearing, the appellant or plaintiff in error shall file his statement, brief and assignments of error five days before the first day of such term, and the Attorney-General shall, on or before the first day of the term, file his brief and statement.

Hereafter no statement or brief shall be filed in a criminal case out of time, nor will counsel who violate this rule be heard in oral argument unless for a good cause shown on motion theretofore filed and ruled on before the day set for the hearing of the case.

When appellants have been allowed to prosecute their appeal as poor persons by the trial court, counsel will be permitted to file typewritten statements and briefs. In cases where the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the Attorney-General his brief and statement five days before the hearing.

Rule 20.—Taking Record from Clerk's Office. No member of the bar shall be permitted to take a record from the clerk's office.

Rule 21.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision con-

flicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard and the motion for rehearing overruled either in division or *En Banc* no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

Rule 22.—Extension of Time. Hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

Rule 23.—Notice to Adverse Party. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall on filing such motion, satisfy the court that such notice has been given.

Rule 24.—Transfers to Court *En Banc*. A motion to transfer a cause under the provisions of the Constitution from either division to Court *En Banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23.

Rule 25.—Return of Original Writs. Original writs or other process issued by either division of the court, or by any judge in vacation, may be made returnable to and disposed of by such division, or the Court *En Banc*, as such division or judge in vacation may order.

Rule 26.—Assignment of Motions in Civil Causes. All motions and matters in civil causes which have not been assigned by the Court *En Banc* to a division for final determination, upon the record, shall be presented to, heard and determined by the Court *En Banc*. All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

Rule 27.—Assignment of Criminal Causes. All criminal causes, and matters pertaining thereto, shall be heard and determined by Division Number Two.

Rule 28.—When Appeal is Returnable: Certificate of Judgment: Transcript. Where appeals shall be taken or writs of error sued out, the appellant shall file a complete transcript or in lieu thereof a certificate of judgment as provided by Section 1479, Revised Statutes 1919, within the time provided by said section and the date of the allowance of the appeal and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file within the time allowed by said Section 1479 a certificate of judgment and may thereafter file a complete transcript and an abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term, shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as when required by said Section 1479, Revised Statutes 1919.

Rule 29.—Oral Arguments. The time allowed for oral argument and statement shall be an hour and ten minutes for appellant or plaintiff in error, or relator, in original proceedings, and fifty minutes for respondent or defendant in error or respondent in original proceedings.

Rule 30.—Letters, etc., to Court. All motions, briefs, letters or communications in any wise relating to a matter pending in this court must be addressed to the clerk, who will lay them before the court in due course. Hereafter any letter or communication relating directly or indirectly to any pending matter, addressed personally or officially to any judge of this court, will be filed with the case and be open to the inspection of the public and opposing parties.

Rule 31.—Record Matters on Appeal. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or the filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Rule 32.—Granting Original Writs. No original remedial writ, except *habeas Corpus*, will be issued by this court in any case wherein adequate relief can be afforded by an appeal or writ of error, or by application for such writ to a court having in that behalf concurrent jurisdiction.

Rule 33.—Procedure as to Original Writs. Oral arguments will not be granted on applications for original remedial writs; and before such writs shall issue, the applicant therefor shall give not less than five days' notice thereof to the adverse party, or his attorney. Such notice shall be in writing, accompanied by a copy of the application for the writ, and the suggestions in support of same. The adverse party may file in this court suggestions in opposition to the issuance of the writ, a copy of which he shall, before filing, serve on the applicant. Whenever the required notice would, in the judgment of the court, defeat the purpose of the writ, it may be dispensed with. On final hearing printed abstracts and briefs shall be filed in all respects as is required in appeals and writs of error in ordinary cases. Motions for reconsideration of the court's action in refusing applications for original writs shall not be filed.

Rule 34.—Certiorari to Courts of Appeals. No writ of *certiorari* shall be granted to quash the judgment of a Court of Appeals on the ground that such court has failed or refused to follow the last controlling decision of the Supreme Court, unless the applicant for such writ shall give all parties to be adversely affected, or their attorneys of record, at least five days' notice of such application; and the applicant shall, in a petition of not exceeding five pages, concisely set out the issue presented to the Court of Appeals and show wherein and in what manner the alleged conflicting ruling arose, and shall designate the precise place in our official reports where the controlling decision will be found. Said petition shall be accompanied by a true copy of the opinion of the Court of Appeals complained of, a copy of the motion for rehearing or to transfer the cause to this court, a copy of the ruling of the Court of Appeals on said motion, and suggestions in support of the petition not to exceed six printed typewritten pages.

The notice to the party to be adversely affected shall be printed or typewritten, accompanied by a true copy of the petition and all exhibits and suggestions in regard thereto. The party to be adversely affected may file, on or before the date fixed by the notice, suggestions of not more than five printed or typewritten pages stating the reasons why such writ should not issue.

